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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1956

No. 51

LESLIE MILLER, INC., APPELLANT,

vs.

STATE OF ARKANSAS

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

FILED MARCH 21, 1956.

JURISDICTION NOTED MAY 28, 1956

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 51

LESLIE MILLER, INC., APPELLANT,

vs.

STATE OF ARKANSAS

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

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[fol. 1]

IN THE PULASKI CIRCUIT COURT, FIRST DIVISION

No. 52702

STATE OF ARKANSAS, Plaintiff,

vs.

LESLIE MILLER, INC., Defendant

INFORMATION—Filed September 30, 1954

Comes Tom Downie, Prosecuting Attorney within and for Pulaski County, Arkansas, and in the name, by the authority and on behalf of the State of Arkansas gives information accusing Leslie Miller, Inc. of the crime of violating the provisions of Act 124 of 1939, as Amended (Secs. 71-701 to 71-721, inclusive, Ark. Stats. 1947), committed as follows, to-wit:

Count I

The said Leslie Miller, Inc., in the County and State aforesaid, on or about the 11th day of May, A. D. 1954, did unlawfully engage in business as a contractor without authority from the Contractors Licensing Board so to do, in that at said time and place, said Leslie Miller, Inc. submitted a bid to the United States Government through the Little Rock office of the United States Corps of Engineers for the construction of certain facilities on property owned by the United States Government in Pulaski County, Arkansas, involving the payment for work to be performed under said contract of the sum of One Million Ninety-Three Thousand Four Hundred Thirty-One Dollars ($1,093,431.00), against the peace and dignity of the State of Arkansas.

[fol. 2] Count II

The said Leslie Miller, Inc., in the County and State aforesaid, did unlawfully engage in business as a contractor without authority from the Contractors Licensing Board so to do, in that on or about the 12th day of May, 1954 said Leslie Miller, Inc. executed a contract with the United States

Government through the Little Rock office of the United States Corps of Engineers, in Pulaski County, Arkansas, for the construction of certain facilities on property owned by the United States Government in Pulaski County, Arkansas, which contract involved the payment for work to be performed under the contract of the sum of One Million Ninety-Three Thousand Four Hundred Thirty-One Dollars ($1,093,431.00); and the said Leslie Miller, Inc., thereafter, on or about the 1st day of June, 1954, entered into the performance of said contract, against the peace and dignity of the State of Arkansas.

Tom Downie, Prosecuting Attorney. By J. Frank Holt, Deputy Prosecuting Attorney.

Subscribed and sworn to before me on this 30th day of September, 1954.

Vivan S. O'Neal, Circuit Clerk. By L. W. Rosteck, D. C.

[File endorsement omitted.]

[fol. 3] First Division Circuit Court, Pulaski County, Arkansas

4794

Charles R. Ramsey, et al., Appellants,

v.

Appeal from Pulaski Circuit Court, First Division, The State of Arkansas, Appellee, and

4795

Tecon Corporation,

v.

The State of Arkansas, and

4796

Leslie Miller, Inc.,

v.

The State of Arkansas, and

4797

Engineering Construction Corporation

v.

The State of Arkansas

Mandate of Supreme Court of Arkansas—February 7, 1955

On stipulation of the parties, these causes are remanded to the Pulaski Circuit Court, First Division, for further trial upon additional facts to be presented.

[fol. 4] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 5] FIRST DIVISION CIRCUIT COURT, PULASKI COUNTY, ARKANSAS

[Title omitted]

AMENDED AND SUBSTITUTED STIPULATION—April 1, 1955

It is stipulated and agreed by and between the defendant, Leslie Miller, Inc., through its attorney, Leffel Gentry, and the State of Arkansas, through Frank Holt, Prosecuting Attorney for the Sixth Judicial District, Pulaski County, Arkansas, as follows:

1

Leslie Miller, Inc. did, on or about the 11th day of May, 1954, submit a bid to the United States Government through the Little Rock office of the United States Corps of Engineers for the construction of certain facilities on property owned by the United States Government in Pulaski County, Arkansas, involving the payment for work to be performed in the sum of $1,093,431.00.

2

The United States Government, through the United States Corps of Engineers, Little Rock office, pursuant to the aforesaid bid, awarded a contract to Leslie Miller, Inc., which contract was formally executed in Pulaski County, Arkansas, on or about the 12th day of May, 1954.

[fol. 6]

3

Leslie Miller, Inc. did, on or about the 1st day of June, 1954, begin work which it contracted to perform, pursuant to the aforesaid bid and contract.

4

On the dates aforesaid, Leslie Miller, Inc., was not licensed to engage in contracting work in the State of Arkansas and had not applied for a license to so do, as may be required by Act 124 of 1939 as amended.

5

The land on which the facilities are being constructed by Leslie Miller, Inc., was purchased by the United States Government under the authority of and for one or more of the purposes provided by Article 1, Section 8, Paragraph 17 of the Constitution of the United States, with the consent of the State of Arkansas as provided by Section 10-1101, Arkansas Statutes, (1947, Annotated), but the United States Government has not accepted jurisdiction over said land as provided by Title 40, Section 255, U.S.C.A.

6

The Contractors Licensing Board has filed a complaint with the Prosecuting Attorney of the Sixth Judicial District of the State of Arkansas, alleging that Leslie Miller, Inc., has violated Act 124 of 1939 as amended, in that it [fol. 7] submitted a bid to construct the aforesaid facilities for the United States Government upon land over and upon which the United States Government exercises no police powers and upon land over and upon which the State of Arkansas does exercise police powers, at a time when Leslie Miller, Inc. was not licensed to engage in the business of contracting in the State of Arkansas; and, further that Leslie Miller, Inc. violated the said Act when, pursuant to said bid, it entered into a contract with the United States Government and commenced work under the terms of said contract without first having procured a license to engage in the business of contracting in the State of Arkansas.

7

Bids were received by the United States Corps of Engineers for the construction of these facilities from Contractors licensed to engage in the contracting business in Arkansas, but such bids were in excess of the bid of Leslie Miller, Inc., who was the lowest responsible bidder. The United States Corps of Engineers is required by applicable federal statutes and administrative regulations to award contracts to the lowest responsible bidder.

8

Certain responsible contractors did not bid on the construction of these facilities, because they were not licensed to engage in the contracting business in Arkansas.

[fol. 8] 9

Leslie Miller, Inc. denies that Act 124 of 1939, as amended, is applicable to its activities in placing the aforesaid bid, procuring the aforesaid contract, and performing work thereunder; and this stipulation is entered into for the purpose of agreeing upon the facts applicable to the information filed in this proceeding against said Leslie Miller, Inc. by the State of Arkansas upon the complaint of the Contractors Licensing Board.

(S.) Frank Holt, Prosecuting Attorney, Leslie Miller, Inc., By (S.) Leffel Gentry, Its Attorney.

[fol. 9] First Division Circuit Court, Pulaski County, Arkansas

No. 52702

State of Arkansas, Plaintiff

vs.

Leslie Miller, Inc., Defendant

Judgment—April 1, 1955

On this day, this cause comes on to be heard, the State of Arkansas, appearing by Frank Holt, Prosecuting Attorney within and for Pulaski County, Arkansas, and the defendant, Leslie Miller, Inc., appearing by its Attorney, Leffel Gentry; and both parties announcing ready for trial, the parties specifically waiving trial by jury and agreeing that the cause would be tried before the court upon the amended and substituted stipulation of facts entered into by the parties hereto; and from the information filed herein by Frank Holt, Prosecuting Attorney within and for

Pulaski County, Arkansas, and in the name, by the authority, and on behalf of the State of Arkansas, the plea of not guilty to each count of the information, entered by Leffel Gentry, as attorney for the defendant, Leslie Miller, Inc., the stipulation entered into by the parties hereto, and the argument of counsel, and other matters and things before the court, the court doth ascertain and determine that the defendant is guilty as charged in both counts of the information filed in this cause by Frank Holt, Prosecuting Attorney within and for Pulaski County, Arkansas, and in [fol. 10] the name, by the authority and on behalf of the State of Arkansas.

It is adjudged that the defendant, Leslie Miller, Inc., is guilty as charged and convicted on each count of the information herein.

It is further adjudged that the defendant's punishment is assessed at a fine of $100.00 and costs on Count I of said information and at a fine of $100.00 and costs on Count II of said information.

(S.) Wm. J. Kirby, Judge.

[fol. 11] First Division Circuit Court, Pulaski County, Arkansas

[Title omitted]

Motion for New Trial—April 1, 1955

Comes Leffel Gentry, Attorney for the defendant herein, and moves the court to set aside the verdict and judgment of the court, rendered in this cause, and that he be granted a new trial for these reasons:

1) The verdict and judgment is contrary to the law.

2) The verdict and judgment is contrary to the evidence.

3) The verdict and judgment is contrary to the law and to the evidence.

4) The court was in error in finding the defendant guilty of the crime as charged in Count I and in Count II of the information.

(S.) Leffel Gentry, Attorney for Defendant.

[fol. 12] First Division Circuit Court, Pulaski County, Arkansas

[Title omitted]

Order Overruling Motion for New Trial—April 1, 1955

On this day comes on to be heard the motion for a new trial of the cause filed herein by the defendant within the time and in the manner provided by law; the State of Arkansas appearing by Frank Holt, Prosecuting Attorney for the Sixth Judicial Circuit, Pulaski County, Arkansas, and defendant appearing by its attorney, Leffel Gentry. The Court from a consideration of the motion, the record herein, and being well and sufficiently advised, does overrule the defendant's motion; to which ruling of the Court the defendant then and there excepted, asked that his exceptions be noted of record, which is hereby done, and prayed for an appeal to the Supreme Court of the State of Arkansas, which appeal is hereby granted.

(S.) Wm. J. Kirby, Judge.

[fol. 13] Pulaski County Circuit Court, First Division

Judge's Certificate to Record—April 11, 1955

And now on this day comes the defendant herein and presents to Hon. William J. Kirby, Judge of the Pulaski Circuit Court, First Division, this, his transcript of record herein, which is by the said Judge examined, found to be a complete and correct record thereof, and the same he now approves.

Witness my hand as such Judge of the Pulaski Circuit Court, First Division, on this 11th day of April, 1955.

Wm. J. Kirby, Circuit Judge.

[fol. 14] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 15] SUPREME COURT OF ARKANSAS

LESLIE MILLER INC., et als., Appellants,

v.

THE STATE OF ARKANSAS, Appellee

Appeal from Pulaski Circuit Court, First Division. Affirmed
LEE SEAMSTER, Chief Justice

OPINION—July 4, 1955

In each of these cases, the appellants were found guilty in Pulaski Circuit Court on each of two counts of an information filed by the Prosecuting Attorney of Pulaski County, Arkansas, on behalf of the State of Arkansas. The separate informations charged appellants with violating the provisions of Act 124 of 1939, as amended (Ark. Stats. 1947, Secs. 71-701 to 71-721) in that each of the appellants, without authority from the Contractors Licensing Board, (1) submitted a bid to the United States for the construction of certain facilities at a cost in excess of $20,000 on property owned, or leased, by the United States in Arkansas and (2) thereafter executed a contract to do said construction and entered into the performance of the contract. In each case, appellants were assessed a fine in the sum of $100 on each of the two counts of the information.

The contract with appellant, Engineering Construction Corporation, is for construction of an Air National Guard installation in Sebastian County, Arkansas, on property leased from the City of Fort Smith for that purpose. The other appellants, Ramsey and Leftwich, Tecon Corporation and Leslie Miller, Inc., have contracts for construction of facilities at the Air Force Base in Pulaski County, Arkansas. All of the above contracts greatly exceed the statutory minimum of $20,000. It is agreed that the lands on which the facilities are being constructed were purchased or leased, by the United States with the consent of the State

of Arkansas but that the United States Government has not accepted jurisdiction over the lands as provided in 40 U. S. C. A. 255.

[fol. 16] In each of the instant cases, appellants expressly deny that Act 124 of 1939, as amended, is applicable to its activities in placing the aforesaid bids, procuring the contracts, and performing work thereunder. The appellants contend that the stipulation in each of the cases shows that the lands upon which the contract is to be performed for the agency of the United States Government are either owned or leased by the United States or its agency for one of the purposes mentioned in Article 1, Section 8, Paragraph 17, of the United States Constitution and the State by the provisions of Section 10-1101 of the Arkansas Statutes, Anno., has consented to the acquisition by the United States of these lands, and has relinquished jurisdiction of the lands. The appellants rely upon the case of *Lynch v. Hammock*, 204 Ark. 911, 165 S. W. 2d 369, in which this Court stated: "We think it clear, under the above authorities, that the laws, supra, affecting the practice of medicine and surgery in Arkansas do not control and cannot apply to the rights of Dr. Lynch to practice on property, the jurisdiction over which has been surrendered to the United States, and the title to which property has been acquired by the United States by purchase."

There is nothing in this opinion to indicate that 40 U. S. C. A. 255 was called to this Court's attention at that time or that the statute was considered. On the other hand it is quite apparent that this Court, in deciding the Lynch case considered only two things: (1) had jurisdiction over the lands in question been surrendered by the State to the United States; and (2) had title to the property been acquired by the United States.

40 U. S. C. A. 255, provides in part as follows: "Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required; but the head or other authorized officer of any department or independent establishment or agency of the Government may, in such cases and at such times as he may deem desirable, accept or secure from the

State in which any lands or interests therein under his immediate jurisdiction, custody, or control are situated, consent to or cession of such jurisdiction, exclusive or partial, not theretofore obtained, over any such lands or in- [fol. 17] terests as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of such acceptance with the Governor of such State or in such other manner as may be prescribed by the laws of the State where such lands are situated. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted."

In the case of *Adams v. United States*, 319 U. S. 312, 87 L. Ed. 1421, the U. S. Supreme Court stated: "Since the Government had not given the notice required by the 1940 Act, it clearly did not have either exclusive or partial jurisdiction over the camp area . . . Since the Government had not accepted jurisdiction in the manner required by the Act, the Federal Court had no jurisdiction of this proceeding. In this view it is immaterial that Louisiana statutes authorize the Government to take jurisdiction, since at the critical time the jurisdiction had not been taken." The opinion in the Lynch case was delivered on November 9, 1942. The Adams case was decided on May 24, 1943.

There can be no argument to the well settled principle that state sovereignty is complete except as clearly abdicated to the Federal Government by the Federal Constitution or by legislative act of cession. Therefore, state sovereignty is presumed in the absence of clear and explicit constitutional or legislative enactment to the contrary.

The appellants next contend that Ark. Stats., Sec. 71-701 to 71-721 directly interferes with the performance of federal functions and cannot, therefore, under the doctrine of implied inter-governmental immunity, constitutionally apply to appellants activities herein. It is contended that the enforcement of the provisions of the Act is in contravention of the sovereign power of the United States, as Article 4, Section 3, Clause 2, of the Constitution of the United States, expressly grants to Congress the power to make all needful

rules and regulations respecting property belonging to the United States.

The facts in these cases clearly show that the appellants are independent contractors. The fact that each appellant had a contract, in excess of $20,000, with the United States to construct buildings on United States Government property does not grant to them immunity from the States' law [fol. 18] (Ark. Stats., Sec. 71-701 to 71-721) which requires contractors to procure a contractors license before they can legally bid, contract or perform work on a contract, in Arkansas.

The United States Government is not a party to this suit, nor are the appellants herein, agents or representatives of the United States Government. An independent contractor is not clothed with governmental immunity solely because of his contractual relationship with the Federal Government. A tax imposed upon an independent contractor is not laid upon a government instrumentality. *Ernest K. James v. Dravo Contracting Co.*, 302 U. S. 134, 82 L. Ed. 155, 58 S. Ct. Rep. 208; *Metcalf and Eddy v. Mitchell*, 269 U. S. 514; *Alabama v. King and Boozer*, 314 U. S. 1; *Graves v. New York, ex rel. O'Keefe*, 306 U. S. 466.

By analogy to these tax cases, state regulation of independent contractors has also been sustained in the face of increased economic burdens passed on indirectly to the Government by the independent contractors. *Penn Dairies v. Milk Control Commission*, 318 U. S. 261; *Stewart & Co. v. Sadrakula*, 309 U. S. 94; *Railway Mail Ass'n v. Corsi*, 326 U. S. 88; *E. E. Morgan Co., Inc. v. State, Use Phillips County*, 202 Ark 464, 150 S. W. 2d. 736; *Sollitt & Sons Construction Co. v. Commonwealth of Virginia*, 172 S. E. 290; *Ohio River Contract Co. v. Gordon*, 244 U. S. 68, 37 S. Ct. 599, 61 L. Ed. 997.

Since the appellants admit that they have violated the provisions of the Act, if the act is applicable to them, we must therefore affirm the judgment of the trial court in each of the above cases.

[fol. 19] IN SUPREME COURT OF ARKANSAS

No. 4807-10

LESLIE MILLER, INC., ET AL., Appellants,

vs.

THE STATE OF ARKANSAS, Appellee

Appeal from Pulaski Circuit Court, First Division District

JUDGMENT—July 4, 1955

This cause came on to be heard upon the transcript of record in the Circuit Court of Pulaski County, First Division District, and was argued by counsel, on consideration whereof it is the opinion of the Court that there is no error in the proceedings and judgment of said Circuit Court in this cause.

It is therefore considered by the Court that the judgment of said Circuit Court in this cause rendered be and the same is hereby in all things affirmed with costs.

It is further considered that said appellee recover of said appellants all her costs in this Court, in this cause expended, and have execution thereof.

In testimony, that the above is a true copy of the judgment of said Supreme Court in the case therein stated, I, C. R. Stevenson, Clerk of said Supreme Court, hereto set my hand and affix the seal of said Court, at my office in the City of Little Rock, this 16th day of November, A. D. 1955.

C. R. Stevenson, Clerk. By Philip N. Gowen, D. C.

[fol. 20] [File endorsement omitted]

IN SUPREME COURT OF ARKANSAS

[Title omitted]

PETITION FOR REHEARING—Filed July 20, 1955

Come the appellants and pray the court to grant them a rehearing in this cause, for the following reasons:

1. The court erred in holding that the State had not relinquished jurisdiction over the lands acquired by the United States, upon which the facilities were being constructed by the appellants.

2. The court erred in assuming that Act 124 of 1939 was applicable to the appellants, without determining from the objects and purposes sought to be accomplished by the Act whether it was intended to be applicable.

3. The court erred in assuming that if the Act was applicable and the State had not surrendered jurisdiction over the lands where the facilities were in the course of construction, the only remaining question was whether the application of the Act of the appellants interfered with the performance of Federal function, and thereby ignoring the question of whether the Federal Government had the exclusive right to protect itself from unqualified and unscrupulous contractors under the authority of Article 4, Section 3, Clause 2 of the Constitution of the United States, even though the State had not surrendered jurisdiction over the lands where the facilities were being constructed by the appellants for the United States.

[fol. 21] 4. The court erred in holding that Act 124 of 1939, as applied to the appellants under the facts presented, was not an interference with the performance of a Federal function; and the cases cited by the court are not in point, nor are they analogous, for the reason that in each of the cases, the State was exercising solvent power which incidentally and indirectly affected the United States in the exercise of its functions, whereas in the instant case, the application of the Act to the appellants under the facts presented would mean that the State has exercised the perogative of protecting the Federal Government from

unqualified and unscrupulous contractors merely because it has jurisdiction over the lands where the contracts are being performed, in direct contravention of Article 4, Section 3, Clause 2 of the Constitution of the United States, which expressly granted this perogative to Congress.

Wherefore, appellants respectfully pray that they be granted a rehearing and, upon rehearing, the judgment against the appellants be reversed and the causes remanded with directions to dismiss the informations against each of them.

(S.) Leffel Gentry, Attorney for Appellants.

Duly sworn to by Leffel Gentry. Jurat omitted in printing.

[fol. 22] IN THE SUPREME COURT OF ARKANSAS

ORDER DENYING REHEARING—October 3, 1955

Rehearings Denied:

Petitions for rehearing in the following cases were denied:

* * * * * * *

4807-8-9-10. Leslie Miller, Inc., et als. v. State

* * * * * * *

[fol. 23] [File endorsement omitted]

SUPREME COURT OF ARKANSAS

No. 4807

LESLIE MILLER, INC., Appellant

vs.

STATE OF ARKANSAS, Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed December 29, 1955

Notice is hereby given that:

I. Leslie Miller, Inc., appellant, appeals to the Supreme Court of the United States from the judgment of this Court entered on October 3, 1955, denying appellant's motion for rehearing of the Court's decision rendered July 4, 1955, which affirmed judgment of conviction of appellant of violation of certain statutes of the State of Arkansas, rendered by the First Division of the Circuit Court of Pulaski County, Arkansas, on the 1st day of April, 1955.

This appeal is pursuant to the authority provided in Section 1257(2) of Title 28 of the United States Code.

Appellant was convicted of unlawfully engaging in the business of a contractor without authority of the Contractor's Licensing Board to do so, (Count 1) by submitting a bid to the United States, and (Count 2) by executing and performing a contract with the United States, for military construction, in violation of the provisions of Act 124 of the Acts of the General Assembly of Arkansas of 1939, as amended (Sections 71-701 to 71-721, inclusive, Arkansas Statutes, 1947), and was sentenced to pay a fine of one hundred dollars ($100.00) on each count.

II. The clerk will please prepare a transcript of the entire record in this cause for transmission to the clerk of the Supreme Court of the United States.

[fol. 24] III. Questions presented:

1. Whether the enforcement of the provisions of Act 124 of the Acts of the General Assembly of Arkansas for 1939,

as amended (Arkansas Statutes, 1947, Sections 71-701 to 71-721, inclusive), as to the defendant, contracting with the United States, is in contravention of the sovereign power of the United States as expressed in Article 4, Section 3, Clause 2, of the Constitution of the United States.

2. Whether in view of the provisions of Article 4, Section 3, Clause 2, of the Constitution of the United States, and the doctrine of intergovernmental immunity, the aforesaid Act may be constitutionally applied to the defendant under the facts presented, where the object and purpose of the Act in protecting the public health, welfare, and safety are afforded by Federal statutes and regulations.

3. Whether defendant may constitutionally be convicted of engaging in business as a contractor without the authority of the Contractors' Licensing Board, for submitting a bid to the United States, and executing and performing a contract with the United States, for military construction in Arkansas, in violation of the aforesaid Act, (a) when the Arkansas statute substantially impairs the exercise of Federal functions; and (b) where the Arkansas statute is inconsistent with Federal law regulating procurement.

(S.) Leffel Gentry, Attorney for Leslie Miller, Inc., Appellant.

CERTIFICATE OF SERVICE (omitted in printing)

[fol. 25] IN THE SUPREME COURT OF ARKANSAS

[Title omitted]

ORDER EXTENDING TIME TO DOCKET CASE—February 21, 1956

Upon motion of the appellant this 21st day of February, 1956, and for good cause shown, the time for docketing this case upon appeal to the Supreme Court of the United States is extended until March 29, 1956.

(S.) Minor W. Millwee, Associate Justice, Arkansas Supreme Court.

[fol. 26] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 27] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER NOTING PROBABLE JURISDICTION—May 28, 1956

Appeal from the Supreme Court of the State of Arkansas.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar.

May 28, 1956.

(632-0)

LIBRARY
SUPREME COURT, U.S.

No. 851

Supreme Court, U. S.
FILED
MAR 23 1956
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

LESLIE MILLER, INC. ..... *Appellant,*

v.

STATE OF ARKANSAS ..... *Appellee.*

APPEAL FROM SUPREME COURT OF ARKANSAS

JURISDICTIONAL STATEMENT

LEFFEL GENTRY,
825 Pyramid Life Building,
Little Rock, Arkansas,
Attorney for Appellant.

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SUPREME COURT OF THE UNITED STATES

LESLIE MILLER, INC. ..... *Appellant,*

v.

STATE OF ARKANSAS ..... *Appellee.*

APPEAL FROM SUPREME COURT OF ARKANSAS

JURISDICTIONAL STATEMENT

(a) The official report of the opinion delivered by the Supreme Court of Arkansas in this cause is *Leslie Miller, Inc.* v. *State of Arkansas,* MS opinion delivered July 4, 1955, Vol. 99 of Law Reporter, Page 701 of No. 20. Such opinion is set forth verbatim in the appendix hereto.

(b) The grounds on which the jurisdiction of this Court is invoked are as follows:

(i.)

The appellant was found guilty as charged on each of two counts of an information filed by the Prosecuting Attorney of Pulaski County, Arkansas, on behalf of the State of Arkansas. The information charged appellant with violating the provisions of Act 124 of 1939, as amended (Ark. Stats. 1947, Sections 71-701 to 71-721, inclusive), in that the appellant, without authority from the State Licensing

Board for General Contractors, (1) submitted a bid to the United States for the construction of certain facilities at a cost in excess of $20,000 on property owned, or leased, by the United States in Arkansas and (2) thereafter executed a contract to do said construction and entered into the performance of the contract. The appellant was fined $100 on each of the two counts of the information.

The case was tried without a jury upon stipulations of fact. As amended, the stipulations reveal that, during the periods here involved, appellant was not licensed to engage in contracting work in the State of Arkansas and had not applied for a license to do so as required by Act 124 of 1939, as amended. Although not licensed, the appellant submitted a bid to the United States for the construction of certain projects at a cost in excess of $20,000 on property owned by the United States in Arkansas. In due course, appellant's bid was accepted and contracts were formally executed in Pulaski County, Arkansas. Thereafter, the appellant began performance of its contract.

It is agreed that the lands on which the facilities are being constructed were purchased by the United States with the consent of the State of Arkansas, but that the United States has not accepted jurisdiction over the lands as provided in 40 U. S. C. 255.

It is further agreed that bids were received for the construction of these facilities from contractors licensed to engage in the contracting business in Arkansas, but that such bids were in excess of the bid of the appellant, who was the lowest responsible bidder. In addition, it appears that certain responsible bidders did not bid on the construction of these facilities because they were not licensed to engage in the contracting business in Arkansas.

In the trial of the case in the First Division of the Circuit Court of Pulaski County, Arkansas, the appellant pleaded not guilty, asserting that (1) Act 124 of 1939, as

amended, was not applicable to its activities in submitting its bid, procuring the contract, and performing work in compliance therewith, and (2) the application of the Act to it would be unconstitutional (a) by reason of the doctrine of implied intergovernmental immunity and (b) was in direct conflict with Federal law regulating procurement by the United States; and on appeal to the Supreme Court of Arkansas argued in its brief these same propositions. Therefore, the conviction of the appellant in the lower court and the affirmance of the conviction by the Supreme Court in spite of appellant's plea of not guilty and the assertion in both courts of the inapplicability and unconstitutionality of the application of the aforesaid Act to it is a declaration by each of said courts of not only the applicability of the Act to the appellant, but of its constitutionality.

(ii.)

(a) The date of the judgment of the First Division of the Circuit Court of Pulaski County, Arkansas, convicting and fining the appellant is the 1st day of April, 1955.

(b) The date of the opinion of the Supreme Court of Arkansas affirming the judgment of conviction of appellant is July 4, 1955.

(c) The date of the order of the Supreme Court of Arkansas denying the appellant's motion for rehearing of its decision is October 3, 1955.

(d) Notice of appeal to the Supreme Court of the United States was filed with the clerk of the Supreme Court of Arkansas on December 29, 1955.

(iii.)

The statutory provision believed to confer on this Court jurisdiction of appeal is Section 1257(2) of Title 28 of the United States Code.

(iv.)

The cases believed to sustain the jurisdiction of this Court are as follows:

Ableman v. *Booth*, 21 How. 506, 16 L. Ed. 169.

Alabama v. *King & Boozer*, 314 U. S. 1.

Arizona v. *California*, 283 U. S. 423.

Baltimore and Annapolis Railway Company v. *Lichtenberg*, 176 Md. 383, 4 A. 2d 734, appeal dismissed, 308 U. S. 525.

Buffington v. *Day*, 11 Wall. 113, 20 L. Ed. 122.

Camfield v. *United States*, 167 U. S. 518, 42 L. Ed. 260.

Carson v. *Roane-Anderson Company*, 342 U. S. 232.

Curry v. *United States*, 314 U. S. 14.

Esso Standard Oil Company v. *Evans*, 345 U. S. 495.

Federal Land Bank v. *Bismarck Company*, 314 U. S. 95.

Franklin National Bank v. *New York*, 347 U. S. 373.

Gibbons v. *Ogden*, 9 Wheat. 1, 6 L. Ed. 1.

Graves v. *New York ex rel. O'Keefe*, 306 U. S. 466.

Hannibal v. *Husen*, 95 U. S. 465, 24 L. Ed. 527.

Henderson v. *Wickham*, 92 U. S. 259, 23 L. Ed. 543.

Hunt v. *United States*, 278 U. S. 96.

James v. *Dravo Contracting Company*, 302 U. S. 134.

James Stewart and Company v. *Sadrakula*, 309 U. S. 94, 84 L. Ed. 596.

Johnson v. Maryland, 254 U. S. 51.

Johnson v. *Yellow Cab Company*, 321 U. S. 383.

Kern-Limerick, Inc. v. *Scurlock*, 347 U. S. 110.

Mayo v. *United States*, 319 U. S. 441.

McCulloch v. *Maryland*, 4 Wheat. 316.

Metcalf and Eddy v. *Mitchell*, 269 U. S. 514.

Ohio v. *Thomas*, 173 U. S. 276.

Osborne v. *United States Bank*, 9 Wheat. 738.

Penn Dairies v. *Milk Control Commission*, 318 U. S. 261.

Pittman v. *Home Owners' Loan Corporation*, 308 U. S. 21.

Railroad Company v. *Peniston*, 18 Wall. 5.

Railway Mail Association v. *Corsi*, 326 U. S. 88.

Society for Savings, etc. v. *Bowers*, No. 204, Oct. Term, 1954, decided May 16, 1955, 23 U. S. Law Week 4201.

Standard Oil Company v. *Johnson*, 316 U. S. 481.

Stewart and Company v. *Sadrakula*, 309 U. S. 94.

United States v. *Snyder*, 149 U. S. 210.

United States v. *Summerlin*, 310 U. S. 414.

United States v. *Tarvle*, 13 Wall. 397, 20 L. Ed. 597.

Utah Power and Light Company v. *United States*, 243 U. S. 389, 61 L. Ed. 791.

Western Union Telegraph Company v. *Pendleton*, 122 U. S. 347, 30 L. Ed. 1187.

White v. *Hart*, 13 Wall. 646, 20 L. Ed. 685.

Wilson v. *Cook*, 327 U. S. 491.

(v.)

The validity of Act 124 of the Acts of the General Assembly of the State of Arkansas of 1939, as amended (Ark. Stats. 1947, Sections 71-701 to 71-721, inclusive), as applied to the appellant is involved; and this Act and the amendatory act are set out verbatim in the appendix hereto.

(c) The question presented by this appeal is as follows: Whether appellant may constitutionally be convicted of engaging in business as a contractor without the authority of the State Licensing Board for General Contractors, for submitting a bid to the United States and executing and performing a contract with the United States for military construction in Arkansas, in violation of Act 124 of the Acts of the General Assembly of Arkansas of 1939, as amended (Ark. Stats. 1947, Sections 71-701 to 71-721, inclusive), (1) when the objects and purposes of the Act of protecting the public health, welfare, and safety are afforded by Federal statutes and regulations; (2) when the Arkansas statute impairs the exercise of Federal functions; and (3) when the Arkansas statute is inconsistent with Federal law regulating procurement.

(d) The appellant pleaded not guilty in the First Division of the Circuit Court of Pulaski County, Arkansas, on the ground that the aforesaid Act 124 of the Acts of 1939, as amended, (1) was not applicable to it and (2), if applicable, was in violation of the Constitution of the United States, for the reasons set forth in Paragraph (c) hereof, which reasons were also argued in its brief to the Supreme Court of Arkansas, as appears from the opinion of that Court set forth verbatim in the appendix hereto.

(e) The grounds upon which it is contended that the Federal question is substantial and which will show that the nature of the case and the ruling of the Supreme Court of Arkansas and the First Division of the Circuit Court of Pulaski County, Arkansas, bring the case within the juris-

dictional provisions heretofore relied upon ((b)(III.) hereof) and the cases heretofore cited to sustain the jurisdiction ((b)(IV.) hereof) and the reasons why the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, are as follows:

As related to the exercise of sovereign powers of states as opposed to the exercise of Federal functions, the effect of the decisions cited in Paragraph (b)(IV.) hereof is that the property, functions, and instrumentalities of the Federal Government are immune from direct state regulation, but that state laws and regulations are applicable to those dealing with the Federal Government (not acting as the agent thereof) when the laws and regulations accomplish a purpose in connection with the exercise by the state of its reserved powers, and are not in conflict with Federal laws, even though the exercise of such reserve powers may incidentally and indirectly burden the Federal Government; but where the application of the state law or regulation, as in this instance, is not necessary to the accomplishment of the only intended purpose of protecting the welfare of its citizens who deal with construction contractors, and its application interferes with the performance of Federal functions and is in conflict with Federal laws and regulation, then the application of the state law or regulation is invalid.

Therefore, the application of Act 124 of the Acts of the General Assembly of Arkansas of 1939, as amended, to the appellant, under the facts here presented, by the First Division of the Circuit Court of Pulaski County, Arkansas, and the affirmation of its judgment of the Supreme Court of Arkansas, and its denial of appellant's motion for rehearing, presents a substantial Federal question and brings this case within the jurisdiction of this Court under

the statute mentioned in Paragraph (b)(III.) hereof and the decisions cited in (b)(IV.) hereof, requiring plenary consideration, with briefs on the merits and oral argument.

Respectfully submitted,

LEFFEL GENTRY,
825 Pyramid Life Building,
Little Rock, Arkansas,
Attorney for Appellant.

CERTIFICATE

I, Leffel Gentry, attorney for Leslie Miller, Inc., appellant, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 21st day of March, 1956, I served copies of the foregoing Jurisdictional Statement upon the State of Arkansas, appellee, by mailing a copy in a duly-addressed envelope with postage prepaid to the Honorable Tom Gentry, Attorney General of Arkansas, State Capitol Building, Little Rock, Arkansas, and W. J. Smith, Boyle Building, Little Rock, Arkansas, attorneys of record for the appellee.

Leffel Gentry

LEFFEL GENTRY

Attorney for Leslie Miller, Inc., Appellant.

APPENDIX

LESLIE MILLER, INC. ..... *Petitioners,*

v. No. 4807-8-9-10

STATE ..... *Respondents.*

1. Jurisdiction—lands acquired within a state by United States. —The provisions of Act 124 of 1939, providing for the licensing of contractors, *held* applicable to contracts for facilities on lands purchased or leased by the United States Government with the consent of the State of Arkansas but over which the United States had not accepted exclusive jurisdiction as provided in 40 U. S. C. A. 225.

2. Licenses—Constitutional Law, Inter-Governmental immunity from.—The fact that independent contractors have contracts with the United States Government to construct building on United States Government property, the exclusive jurisdiction of which has not been accepted by the United States as provided in 40 U. S. C. A. 255, does not grant to them an immunity from Act 124 of 1939 requiring them to procure a license before they can legally bid, contract or perform work on a contract in Arkansas in excess of $20,000.

Appeal from Pulaski Circuit Court, First Division; *Wm. J. Kirby*, Judge; affirmed.

Sherrill, Gentry & Bonner, for appellant.

Tom Gentry, Attorney General, *Thorp Thomas*, Assistant Attorney General, and *Mehaffy, Smith & Williams*, for appellee.

Warren E. Gurger, Asst. U. S. Attorney General, and *Osro Cobb*, U. S. District Attorney, *Amici Curiae*.

Lee Seamster, Chief Justice. In each of these cases the appellants were found guilty in Pulaski Circuit Court on each of two counts of an information filed by the Prosecuting Attorney of Pulaski County, Arkansas, on behalf of the State of Arkansas. The separate informations charged appellants with violating the provisions of Act 124 of 1939, as amended (Ark. Stats. 1947, §§ 71-701 to 71-721) in that each of the appellants, without authority from the Contractors Licensing Board, (1) submitted a bid to the United Seates for the construction of certain facilities at a cost in excess of $20,000 on property owned, or leased, by the United States in Arkansas and (2) thereafter executed a contract to do said construction and entered into the performance of the contract. In each case, appellants were assessed a fine in the sum of $100 on each of the two counts of the information.

The contract with appellant, Engineering Construction Corporation, is for construction of an Air National Guard installation in Sebastian County, Arkansas, on property leased from the City of Fort Smith for that purpose. The other appellants, Ramsey and Leftwich, Tecon Corporation and Leslie Miller, Inc., have contracts for construction of facilities at the Air Force Base in Pulaski County, Arkansas. All of the above contracts greatly exceed the statutory minimum of $20,000. It is agreed that the lands on which the facilities are being constructed were purchased or leased, by the United States with the consent of the State of Arkansas but that the United States Government has not accepted jurisdiction over the lands as provided in 40 U. S. C. A. 255.

In each of the instant cases, appellants expressly deny that Act 124 of 1939, as amended, is applicable to its activities in placing the aforesaid bids, procuring the contracts, and performing work thereunder. The appellants contend that the stipulation in each of the cases shows that the lands upon which the contract is to be performed for

the agency of the United States Government are either owned or leased by the United States or its agency for one of the purposes mentioned in Article 1, § 8, Paragraph 17, of the United States Constitution and the State by the provisions of § 10-1101 of the Arkansas Statutes, Anno., has consented to the acquisition by the United States of these lands, and has relinquished jurisdiction of the lands. The appellants rely upon the case of *Lynch* v. *Hammock*, 204 Ark. 911, 165 S. W. 2d 369, in which this Court stated: "We think it clear, under the above authorities, that the laws, supra, affecting the practice of medicine and surgery in Arkansas do not control and cannot apply to the rights of Dr. Lynch to practice on property, the jurisdiction over which has been surrendered to the United States, and the title to which property has been acquired by the United States by purchase."

There is nothing in this opinion to indicate that 40 U. S. C. A. 255 was called to this Court's attention at that time or that the statute was considered. On the other hand it is quite apparent that this Court, in deciding the Lynch case considered only two things: (1) had jurisdiction over the lands in question been surrendered by the State to the United States; and (2) had title to the property been acquired by the United States.

40 U. S. C. A. 255 provides in part as follows: "Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required; but the head or other authorized officer of any department or independent establishment or agency of the Government may, in such cases and at such times as he may deem desirable, accept or secure from the State in which any lands or interests therein under his immediate jurisdiction, custody, or control are situated, consent to or cession of such jurisdiction, exclusive or partial, not theretofore obtained, over any such

lands or interests as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of such acceptance with the Governor of such State or in such other manner as may be prescribed by the laws of the State where such lands are situated. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted."

In the case of *Adams* v. *United States*, 319 U. S. 312, 87 L. Ed. 1421, the U. S. Supreme Court stated: "Since the Government had not given the notice required by the 1940 Act, it clearly did not have either exclusive or partial jurisdiction over the camp area . . . Since the Government had not accepted jurisdiction in the manner required by the Act, the Federal Court had no jurisdiction of this proceeding. In this view it is immaterial that Louisiana statutes authorize the Government to take jurisdiction, since at the critical time the jurisdiction had not been taken." The opinion in the Lynch case was delivered on November 9, 1942. The Adams case was decided on May 24, 1943.

There can be no argument to the well settled principle that state sovereignty is complete except as clearly abdicated to the Federal Government by the Federal Constitution or by legislative act of cession. Therefore, state sovereignty is presumed in the absence of clear and explicit constitutional or legislative enactment to the contrary.

The appellants next contend that Ark. Stats., §§ 71-701 to 71-721, directly interferes with the performance of federal functions and cannot, therefore, under the doctrine of implied inter-governmental immunity, constitutionally apply to appellants' activities herein. It is contended that the enforcement of the provisions of the Act is in contravention of the sovereign power of the United States, as Article 4, § 3, Clause 2, of the Constitution of the United

States expressly grants to Congress the power to make all needful rules and regulations respecting property belonging to the United States.

The facts in these cases clearly show that the appellants are independent contractors. The fact that each appellant had a contract, in excess of $20,000 with the United States to construct buildings on United States Government property does not grant to them immunity from the State's law (Ark. Stats., §§ 71-701 to 71-721) which requires contractors to procure a contractor's license before they can legally bid, contract or perform work on a contract, in Arkansas.

The United States Government is not a party to this suit, nor are the appellants herein, agents or representatives of the United States Government. An independent contractor is not clothed with governmental immunity solely because of his contractual relationship with the Federal Government. A tax imposed upon an independent contractor is not laid upon a government instrumentality. *Ernest K. James* v. *Dravo Contracting Co.*, 302 U. S. 134, 82 L. Ed. 155, 58 S. Ct. Rep. 208; *Metcalf and Eddy* v. *Mitchell*, 269 U. S. 514; *Alabama* v. *King and Boozer*, 314 U. S. 1; *Graves* v. *New York, ex rel. O'Keefe*, 306 U. S. 466.

By analogy to these tax cases, state regulation of independent contractors has also been sustained in the face of increased economic burdens passed on indirectly to the Government by the independent contractors. *Penn Dairies* v. *Milk Control Commission*, 318 U. S. 261; *Stewart & Co.* v. *Sadrakula*, 309 U. S. 94; *Railway Mail Ass'n* v. *Corsi*, 326 U. S. 88; *E. E. Morgan Co., Inc.*, v. *State, Use Phillips County*, 202 Ark. 404, 150 S. W. 2d 736; *Sollitt & Sons Construction Co.* v. *Commonwealth of Virginia*, 172 S. E. 290; *Ohio River Contract Co.* v. *Gordon*, 244 U. S. 68, 37 S. Ct. 599, 61 L. Ed. 997.

Since the appellants admit that they have violated the provisions of the Act, if the Act is applicable to them, we must therefore affirm the judgment of the trial court in each of the above cases.

ACT 124 of the Acts of the General Assembly of Arkansas for the Year 1939.

AN ACT to Regulate the Practice of General Contracting in the State of Arkansas: Creating and Establishing a State Licensing Board for General Contractors: Defining the Term "General Contractor," as Herein Used: Providing for the Appointment of Said Board, and for the Issuance of Licenses to General Contractors, as Well as for Said Board's Revocation of Said Licenses: Authorizing the Fixing of Reasonable Fees to Be Paid by Licensees for the Purpose of Defraying the Costs or Issuing Licenses Hereunder: Providing for Court Review of Adverse Ruling of Said Board: Prohibiting Engaging in Business as General Contractor Without First Complying With the Provisions of this Act: Fixing Penalties for the Violation of This Act; and Repealing All Laws, or Parts of Laws in Conflict Therewith, and for Other Purposes.

Be It Enacted by the General Assembly of the State of Arkansas:

SECTION 1. That for the purposes of this Act a "General Contractor" is defined to be any person, firm, partnership, co-partnership, association, corporation, or other organization, or any combination thereof, who for a fixed price, commission, fee or wage attempts to or submits a bid or bids to construct, or undertakes to construct, or assume charge of the construction, erection, alteration, repair, or have constructed, erected, altered, or repaired, under his, their or its direction, any building, highway, sewer, grading, or any improvement or structure when the cost of the undertaking is Ten Thousand Dollars ($10,000.00) or more, and one who shall engage in the construction or

superintending the construction of any structure or any undertaking or improvements, as above mentioned in the State of Arkansas, costing Ten Thousand Dollars ($10,000.00) or more, shall be deemed to have engaged in the business of general contracting in the State of Arkansas, provided that this definition shall not include architects or engineers, whose only financial interest in the projects shall be the architectural or engineering fees for preparing plans and specifications, surveys and supervision.

SECTION 2. That there is hereby created a State Licensing Board for General Contractors, consisting of five (5) members, who shall be appointed by the Governor. Each member shall be at least thirty-five (35) years of age, a resident of the State of Arkansas, and a general contractor of not less than ten (10) years' experience in responsible charge of construction projects of magnitude consistent with the duties of his office. At least one member of such Board shall have had as a larger part of his business the construction of highways. At least one member of such Board shall have had as a larger part of his business the construction of sewers and waterworks. At least one member of such Board shall have had as larger part of his business the construction of buildings. The members of the Board shall be appointed for one, two, three, four, and five years, respectively, their terms expiring on the 31st day of December of said year. Thereafter in each year the Governor shall appoint to fill the vacancy caused by expiration, for a term of five years. Each member shall hold over, after the expiration of his term, until his successor shall be duly appointed and qualified. If a vacancy shall occur in the Board for any cause, same shall be filled by appointment by the Governor, and the Governor may remove any member of the Board at any time for misconduct, incompetency or neglect of duty.

SECTION 3. That each member of the Board shall receive a certificate of appointment from the Governor,

and, before entering upon the discharge of the duties of his office, shall file with the Secretary of State the constitutional oath of office Each member of the Board first created shall receive a license to operate as a general contractor under this Act from the Governor, and thereafter no one shall be eligible for appointment on the Board who does not at the time hold an unexpired license to operate as a general contractor in Arkansas under this Act, and who has not been a bona fide resident of Arkansas for the previous five (5) years, and at the time of appointment does not maintain his general office in Arkansas. The Board, or any Committee thereof, shall be entitled to the services of the Attorney General, or the Legal Department of the State, in connection with the operation of the affairs of the Board. Such additional legal counsel, however, may be employed by the Board from time to time as it may deem necessary.

SECTION 4. That the Board shall, within thirty (30) days after its appointment by the Governor, meet in the City of Little Rock at a time and place to be designated by the Governor, and at said meeting shall elect a Chairman, Vice-Chairman, and Secretary each to serve in his respective capacity for one year, and thereafter said officers shall be elected by said Board annually. Said Board shall have power to make such by-laws, rules, and regulations for its operation as it shall deem best; provided the same are not in conflict with the laws of the State of Arkansas. The Board shall adopt a seal for its own use. The seal shall have on it the words, "Arkansas State Licensing Board for General Contractors, Seal," and the Secretary shall have charge, care and custody thereof. That within sixty (60) days after the Board has been organized, it shall meet for the purpose of receiving applications for certificates to engage in the business of general contracting, and for the transaction of such other business as may come before it, and thereafter shall have two (2) regular meetings in each

year; one in the month of February, and one in the month of August, for the purpose of transacting such business as may properly come before it, or call of the Chairman of the Board. Special or adjourned meetings may be held at such time as the Board may provide by the by-laws which it shall adopt, or at such time as the Board may, by reasonable resolution, provide. Due notice of each meeting and the time and place thereof shall be given to each member in such manner as the by-laws shall provide. Three (3) members of the Board shall constitute a quorum. All meetings of the Board shall be held in Little Rock, Arkansas.

SECTION 5. The Secretary shall keep a record of the proceedings of said Board, and shall receive and turn over to the Treasurer of the State of Arkansas all moneys derived from the operation of this Act, and shall draw and certify all vouchers for expenses incurred by the Board. The said vouchers shall be countersigned by the Chairman of the Board, and drawn to the Auditor of the State of Arkansas who shall issue warrants to the Treasurer of the State of Arkansas for the payment of such certified expenses. All moneys received by the State Treasurer shall be kept by him as a separate fund styled "General Contractor's Fund." The Secretary shall give bond in such sum as the State Treasurer shall determine with such surety company as shall be approved by the State Treasurer, said bond to be conditioned upon the faithful performance of the duties of his office, and upon the faithful accounting of all moneys and other properties which shall come into his hands.

SECTION 6. That each member of the Board shall receive Ten Dollars ($10.00) per day while said Board is in session, and reimbursement for necessary traveling expense, board and lodging. The Board shall be further empowered to employ an Assistant Secretary who is qualified to report the proceedings had before and by the Board, and whose salary shall not exceed the sum of Eighteen Hun-

dred Dollars ($1,800.00) per year. All expenses incurred by the Board for Administration of this Act are hereby authorized to be paid by the Board.

SECTION 7. That the Secretary shall keep a register of all applications for license showing for each the date of application, name, qualification, place of business, place of residence, and whether the license was granted or refused, as well as a complete transcript of the proceedings, including evidence submitted by applicants, licensees, the Board, or otherwise, at any hearing. The books and register of this Board, including transcripts of proceedings, shall be prima facie evidence of all matters recorded therein, and a certified copy of such books or register, including transcript of proceedings, under the seal of the Board, attested by its Secretary, shall be received in evidence in all courts of the State in lieu of the original. A roster showing the names and places of business and of residence of all licensed general contractors shall be prepared by the Secretary of the Board as soon as convenient, and not more than ninety (90) days after the Board shall have organized, and during the month of January of each succeeding year. Such roster shall be ordered printed by the Board and paid for out of the funds herein appropriated for the operation of this Act. On or before the first day of March of each year, the Board shall submit to the Governor a report of its transactions for the preceding year, and shall file with the Secretary of State a copy of such report, together with a complete statement of receipts and expenditures of the Board attested by the affidavit of the Chairman and Secretary, and copy of said roster of licensed general contractors.

SECTION 8. That any one, other than members selected by the Governor as hereinbefore provided, hereafter desiring to be licensed as a general contractor in this State shall make and file with the Board thirty (30) days prior to any regular or special meeting thereof, a written applica-

tion on such form as may then be by the Board prescribed, for examination by the Board, said application to be accompanied by a certified check in the sum of Fifty Dollars ($50.00) payable to the Arkansas State Licensing Board for General Contractors. If said application complies with the Board's rules and regulations, then the applicant shall be entitled to an examination to determine his, their, or its qualifications. If the result of the examination of any applicant shall be satisfactory to the Board, then the Board shall issue to the applicant a certificate to engage in general contracting in the State of Arkansas. Any person thus receiving a certificate of license from the Board shall forthwith have it recorded in the office of the Secretary of State, and the date of recording shall be evidenced thereon. Until the license is recorded, the holder thereof shall not exercise any of the rights or privileges therein conferred, and in case such license is not recorded within sixty (60) days from the date of its issuance it shall become invalid. The Secretary of State shall be paid a fee of $1.00 for recording said certificate, and shall keep in a book to be provided by him for that purpose a complete list of certificate of license recorded by him, together with the date of each, and the date of recording. Any applicant failing to pass the examination prescribed by the Board shall be entitled to the refund of his, their or its fee accompanying the application. Any one failing to pass such examination may be re-examined at any regular meeting of the Board upon payment of regular fee. The certificate of authority to engage in the business of general contracting in the State of Arkansas shall expire the last day of December following the issuance or renewal, and shall become invalid on that date unless renewed. A fee of Fifty Dollars ($50.00) payable at the time of the filing of the application, as hereinbefore provided, shall be assessed against each applicant, and thereafter an annual license fee in the sum of Fifty Dollars ($50.00) shall be paid by each

Licensee to defray the costs and expenses of the operation of this Act.

SECTION 9. That the Board, in determining the qualifications of any applicant for original license, or any renewal license, shall, among other things, consider the following: (a) experience, (b) ability, (c) character, (d) the manner of performance of previous contracts, (e) financial condition, (f) equipment, (g) any other fact tending to show ability and willingness to conserve the public health and safety, and (h) default in complying with the provisions of this Act, or any other law of the State. A record shall be made and preserved by the Board of each examination of applicant or licensee, and the findings of the Board thereon, and a certified copy of the record shall be furnished to any applicant or licensee desiring to appeal from the findings of said Board, as hereinafter provided, upon payment of the costs of transcribing such record.

SECTION 10. That the Board shall have power to limit the license to that character of work for which the applicant is qualified.

SECTION 11. That the Board shall have the power to revoke the certificate of license of any general contractor licensed hereunder who is found guilty of any fraud or deceit in obtaining a license or for gross negligence, incompetence or misconduct in the conduct of his, their, or its business. Any person may prefer charges of such fraud, deceit, negligence or misconduct against any general contractor licensed hereunder. Such charge shall be in writing and sworn to by the complainant and mailed to the Board. Such charges, unless dismissed without hearing by the Board as unfounded or trivial, shall be heard and determined by the Board within thirty days after the date on which they were made. A time and place for such hearing shall be fixed by the Board and held in the City of Little Rock, County of Pulaski, and State of Arkansas. A copy

of the charges, together with the notice of the time and place of hearing, shall be considered as legally served by the Board when sent to the last known address of the accused by registered mail, at least ten days before the fixed date for the hearing, and in the event that such service cannot be effected ten days before such hearing, then the date of hearing and determination shall be postponed as may be necessary to permit the carrying out of this condition. At said hearing the accused shall have the right to appear personally and by counsel, and to cross-examine witnesses against him, them or it, and to submit evidence in his, their or its behalf and defense. If after said hearing the Board finds the facts as alleged and of such character as to disqualify the licensee, then the Board shall revoke the license of the accused, but in such event no refund shall be made of the license fee. The Board may, within its discretion and upon proper application or hearing, reissue a license to any person, firm or corporation whose license has been revoked. The Board shall immediately notify the Secretary of State of its findings in the case of a revocation of a license, or of a reissuance of a revoked license. A certificate of license to replace any certificate lost, destroyed or mutilated may be issued subject to the rules and regulations of the Board.

SECTION 12. That the issuance of a certificate of license by this Board shall be evidence that the person, firm or corporation named therein is entitled to all of the rights and privileges of a licensed general contractor while the said license remains unrevoked or unexpired.

SECTION 13. That any person, firm or corporation not being duly authorized, who shall engage or attempt to engage in the business of general contracting in this State, except as provided for in this Act, and any person, firm or corporation presenting or attempting to file as their own the license certificate of another, or who shall give false or forged evidence of any kind to the Board, or to

any member thereof, in obtaining a certificate of license, or who shall impersonate another, or who shall use an expired or revoked certificate or license, shall be deemed guilty of a misdemeanor, and shall be liable to a fine of not less than One Hundred Dollars ($100.00), nor more than Two Hundred Dollars ($200.00), for each offense, each day to constitute a separate offense.

SECTION 14. That in all prosecutions for violations of the provisions of this Act for engaging in the business of general contracting without a certificate of authority, it shall be sufficient to allege in the indictment, affidavit or complaint that "A. unlawfully engaged in business as a general contractor, without authority from the State Licensing Board for General Contractors so to do."

SECTION 15. That the following shall be exempted from the provisions of this Act: The practice of general contracting as defined in Section 1 of this Act by an authorized representative or representatives of the United States Government, State of Arkansas, incorporated town, city or county, or other political subdivision in this State.

SECTION 16. That a corporation or partnership may engage in the business of general contracting; provided, at least one of the principals of such corporation or partnership is in responsible charge of such business and is licensed as herein required of general contractors.

SECTION 17. That when any contractor not being licensed by this Board in accordance with the provisions of this Act, shall engage, or attempt to engage, in the business of general contracting as herein defined, the Board shall have the right to go into the proper court in the jurisdiction in which the work is being performed, and upon affidavit secure a writ of injunction, without bond, restraining and prohibiting the said contractor from performance of the work then being done, or about to commence.

SECTION 18. That all architects and engineers preparing plans and specifications for work to be contracted in the State of Arkansas shall include in their invitation to bidders and in their specifications a copy of this Act, or such portions thereof, as are deemed necessary to convey to the invited bidder, whether he is a resident of this State, or not, the information that it will be necessary for him to have evidence of a license before his bid is considered.

SECTION 19. That any party aggrieved by any decision of the State Licensing Board for General Contractors shall have the right to seek review thereof by filing a petition within thirty (30) days from the finding made by said Board before any division of the Circuit Court of Pulaski County, Arkansas, in which said aggrieved party shall set out in what respect the adverse action of the Board complained of is erroneous and prejudicial, and shall request the court to review the record of the findings of said Board. Upon trial duly had, the record of the examination and hearing by the Board shall be reviewed by the Circuit Court, and at the conclusion thereof the court shall either uphold the action of the Board or shall direct the granting of the application for license denied, or the reinstatement of the license revoked, as the case may be from which an appeal may be taken either by the applicant or by the Board to the Supreme Court as in other cases.

SECTION 20. That if any Section, sentence or provision of this Act shall be held unconstitutional, such holding shall not affect the remainder of the Act not in itself unconstitutional.

SECTION 21. That all laws or parts of laws in conflict herewith be, and the same are hereby, repealed.

SECTION 22. It is hereby determined and declared to be a fact that the practice of general contracting in the State of Arkansas is in need of regulation; that due to unethical practices, contractors within the State are being

unduly penalized and are suffering irreparable injury, and this Act, being necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, and this Act shall take effect and be in force from and after its passage.

APPROVED: February 24, 1939.

ACT 217 of the Acts of the General Assembly of Arkansas for the Year 1945.

AN ACT to Amend Sections 7, 8, and 13 of Act 124 of the Acts of the General Assembly of the State of Arkansas for the Year 1939, Approved February 24, 1939, and for Other Purposes.

Be It Enacted by the General Assembly of the State of Arkansas:

SECTION 1. That Section 7 of Act 124 of the Acts of the General Assembly of the State of Arkansas for the year 1939, approved February 24, 1939, be, and the same is hereby amended to read as follows:

"SECTION 7. That the Secretary shall keep a register of all applications for license showing for each the date of application, name, qualification, place of business, place of residence, and whether the license was granted or refused, as well as a complete transcript of the proceedings, including evidence submitted by applicants, licensees, the Board, or otherwise, at any hearing. The books and register of this Board, including transcripts of proceedings, shall be prima facie evidence of all matters recorded therein, and a certified copy of such books or register, including transcript of proceedings, under the seal of the Board, attested by its Secretary, shall be received in evidence in all courts of the State in lieu of the original. A roster showing the names and places of business and of residence of all licensed general contractors shall be prepared by the Secretary of the Board as soon as convenient, and not more than ninety (90) days after the Board shall have or-

ganized, and during the month of August of each succeeding year. Such roster shall be ordered printed by the Board and paid for out of the funds herein appropriated for the operation of this Act. On or before the first day of August of each year, the Board shall submit to the Governor a report of its transactions for the preceding year, and shall file with the Secretary of State a copy of such report, together with a complete statement of receipts and expenditures of the Board attested by the affidavit of the General Assembly of the State of Arkansas for the licensed general contractors."

SECTION 2. That Section 8 of Act 124 of the Acts of the General Assembly of the State of Arkansas for the year 1939, approved February 24, 1939, be, and the same is hereby amended to read as follows:

"SECTION 8. That any one, other than members selected by the Governor as hereinbefore provided, hereafter desiring to be licensed as a general contractor in this State shall make and file with the Board thirty (30) days prior to any regular or special meeting thereof, a written application on such form as may then be by the Board prescribed, for examination by the Board, said application to be accompanied by a certified check in the sum of Fifty Dollars ($50.00) payable to the Arkansas State Licensing Board for General Contractors. If said application complies with the Board's rules and regulations, then the applicant shall be entitled to an examination to determine his, their, or its qualifications. If the result of the examination of any applicant shall be satisfactory to the Board, then the Board shall issue to the applicant a certificate to engage in general contracting in the State of Arkansas. Any person thus receiving a certificate of license from the Board shall forthwith have it recorded in the office of the Secretary of State, and the date of recording shall be evidenced thereon. Until the license is recorded, the holder thereof shall not exercise any of the rights or privileges therein

conferred, and in case such license is not recorded within sixty (60) days from the date of its issuance it shall become invalid. The Secretary of State shall be paid a fee of $1.00 for recording said certificate, and shall keep in a book to be provided by him for that purpose a complete list of certificates of license recorded by him, together with the date of each, and the date of recording. Any applicant failing to pass the examination prescribed by the Board shall be entitled to the refund of his, their or its fee accompanying the application. Any one failing to pass such examination may be re-examined at any regular meeting of the Board upon payment of regular fee."

The certificates of authority to engage in the business of general contracting in the State of Arkansas issued in the year 1945 shall expire June 30, 1946, and thereafter all certificates of authority issued shall expire the last day of June following the issuance or renewal, and shall become invalid on that date unless renewed. A fee of Fifty Dollars ($50.00), payable at the time of filing the application as hereinbefore provided, shall be assessed against each applicant and thereafter an annual license fee in the sum of Fifty Dollars ($50.00) shall be paid by each Licensee to defray the cost and expenses of the operation of this Act.

SECTION 3. That Section 13 of said Act 124 of the Acts of the General Assembly for the year 1939, be, and the same is hereby amended to read as follows:

"SECTION 13. That any person, firm or corporation not being duly authorized, who shall engage or attempt to engage in the business of general contracting in this State, except as provided for in this Act, and any person, firm or corporation presenting or attempting to file as their own the license certificate of another, or who shall give false or forged evidence of any kind to the Board, or to any member thereof, in obtaining a certificate of license, or who shall impersonate another, or who shall use an expired or revoked certificate or license shall be deemed

guilty of a misdemeanor, and shall be liable to a fine of not less than One Hundred Dollars ($100.00), nor more than Two Hundred Dollars ($200.00), for each offense, each day to constitute a separate offense." And provided further that no action may be brought either at law or in equity to enforce any provision of any contract entered into in violation of this Act.

SECTION 4. That all laws and parts of laws in conflict herewith are hereby repealed.

SECTION 5. Whereas, with the close of the present war a great revival in contracting in this State is anticipated, and with the increase in construction business a vast influx of contractors from other sections is anticipated. That it is vitally essential that the responsibility and experience of these contractors be known in order to prevent unfair competition and delay in construction of vitally needed facilities, therefore, this Act being necessary for the immediate preservation of the public peace, health and safety an emergency is hereby declared and this Act shall take effect and be in full force from and after its passage.

APPROVED: March 20, 1945.

PULASKI COUNTY CIRCUIT COURT

FIRST DIVISION

Friday, April 1, 1955

STATE OF ARKANSAS ..... *Plaintiff*

v. No. 52702

LESLIE MILLER, INC. ..... *Defendant*

JUDGMENT

On this day, this cause comes on to be heard, the State of Arkansas, appearing by Frank Holt, Prosecuting Attor-

ney within and for Pulaski County, Arkansas, and the defendant, Leslie Miller, Inc., appearing by its Attorney, Leffel Gentry; and both parties announcing ready for trial, the parties specifically waiving trial by jury and agreeing that the cause would be tried before the court upon the amended and substituted stipulation of facts entered into by the parties hereto; and from the information filed herein by Frank Holt, Prosecuting Attorney within and for Pulaski County, Arkansas, and in the name, by the authority, and on behalf of the State of Arkansas, the plea of not guilty to each count of the information, entered by Leffel Gentry, as attorney for the defendant, Leslie Miller, Inc., the stipulation entered into by the parties hereto, and the argument of counsel, and other matters and things before the Court, the Court doth ascertain and determine that the defendant is guilty as charged in both counts of the information filed in this cause by Frank Holt, Prosecuting Attorney within and for Pulaski County, Arkansas, and in the name, by the authority and on behalf of the State of Arkansas.

It is adjudged that the defendant, Leslie Miller, Inc., is guilty as charged and convicted on each count of the information herein.

It is further adjudged that the defendant's punishment is assessed at a fine of $100.00 and costs on Count I of said information and at a fine of $100.00 and costs on Count II of said information.

(s) William J. Kirby, Judge

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 51

LESLIE MILLER, INC. ..... *Appellant,*

v.

STATE OF ARKANSAS ..... *Appellee.*

APPEAL FROM SUPREME COURT OF ARKANSAS

BRIEF OF APPELLANT

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 51

LESLIE MILLER, INC. ..... *Appellant,*

v.

STATE OF ARKANSAS ..... *Appellee.*

APPEAL FROM SUPREME COURT OF ARKANSAS

BRIEF OF APPELLANT

(a)

The official report of the opinion delivered by the Supreme Court of Arkansas in this cause is *Leslie Miller, Inc.* v. *State of Arkansas*, MS opinion delivered July 4, 1956, Vol. 99 of Law Reporter, Page 701 of No. 20 (R. 9-12).

(b)

The grounds on which the jurisdiction of this Court is invoked are as follows:

The appellant was found guilty as charged on each of two counts of an information filed by the Prosecuting Attorney of Pulaski County, Arkansas, on behalf of the State

of Arkansas. The information (R. 1-2) charged appellant with violating the provisions of Act 124 of 1939, as amended (Ark. Stats. 1947, Sections 71-701 to 71-721 inclusive), in that the appellant, without authority from the State Licensing Board for General Contractors, (1) submitted a bid to the United States for the construction of certain facilities at a cost in excess of $20,000 on property owned, or leased, by the United States in Arkansas and (2) thereafter executed a contract to do said construction and entered into the performance of the contract. The appellant was fined $100 on each of the two counts of the information (R. 6-7).

The case was tried without a jury upon stipulations of fact (R. 6-7). As amended, the stipulations reveal:

(1) That, during the periods here involved, appellant was not licensed to engage in contracting work in the State of Arkansas and had not applied for a license to do so as required by Act 124 of 1939, as amended. Although not licensed, the appellant submitted a bid to the United States for the construction of certain projects at a cost in excess of $20,000 on property owned by the United States in Arkansas. In due course, appellant's bid was accepted and contracts were formally executed in Pulaski County, Arkansas. Thereafter, the appellant began performance of its contract (R. 4-6).

(2) That the lands on which the facilities are being constructed were purchased by the United States with the consent of the State of Arkansas, but that the United States has not accepted jurisdiction over the lands as provided in 40 U. S. C. 255 (R. 5).

(3) That bids were received for the construction of these facilities from contractors licensed to engage in the contracting business in Arkansas, but that such bids were in excess of the bid of the appellant, who was the lowest responsible bidder (R. 5); and that certain responsible

bidders did not bid on the construction of these facilities because they were not licensed to engage in the contracting business in Arkansas (R. 6).

In the trial of the case in the First Division of the Circuit Court of Pulaski County, Arkansas, the appellant pleaded not guilty, asserting that (1) Act 124 of 1939, as amended, was not applicable to its activities in submitting its bid, procuring the contract, and performing work in compliance therewith, and (2) the application of the Act to it would be unconstitutional (a) by reason of the doctrine of implied intergovernmental immunity and (b) was in direct conflict with Federal law regulating procurement by the United States; and on appeal to the Supreme Court of Arkansas argued in its brief these same propositions. Therefore, the conviction of the appellant in the lower court and the affirmance of the conviction by the Supreme Court in spite of appellant's plea of not guilty and the assertion in both courts of the inapplicability and unconstitutionality of the application of the aforesaid Act to it is a declaration by each of said courts of not only the applicability of the Act to the appellant, but of its constitutionality.

The date of the judgment of the First Division of the Circuit Court of Pulaski County, Arkansas, convicting and fining the appellant is the 1st day of April, 1955 (R. 6).

The date of the opinion of the Supreme Court of Arkansas affirming the judgment of conviction of appellant is July 4, 1955 (R. 9).

The date of the order of the Supreme Court of Arkansas denying the appellant's motion for rehearing of its decision is October 3, 1955 (R. 15).

Notice of appeal to the Supreme Court of the United States was filed with the clerk of the Supreme Court of Arkansas on December 29, 1955 (R. 16).

The statutory provision believed to confer on this Court jurisdiction of appeal is Section 1257(2) of Title 28 of the United States Code.

(c)

The validity of Act 124 of the Acts of the General Assembly of the State of Arkansas of 1939, as amended (Ark. Stats. 1947, Sections 71-701 to 71-721, inclusive), as applied to the appellant is involved; and this Act and the amendatory act are set out verbatim in the appendix hereto.

(d)

The question presented by this appeal is whether appellant may constitutionally be convicted of engaging in business as a contractor without the authority of the State Licensing Board for General Contractors of Arkansas for submitting a bid to the United States and executing and performing a contract with the United States for military construction in Arkansas, in violation of Act 124 of the Acts of the General Assembly of Arkansas of 1939, as amended (Ark. Stats. 1947, Sections 71-701 to 71-721, inclusive), (1) when the objects and purposes of the Act of protecting the public health, welfare, and safety are afforded by Federal statutes and regulations; (2) when the Arkansas statute impairs the exercise of Federal functions and (3) when the Arkansas statute is inconsistent with Federal law regulating procurement.

(e)

A statement of the case heretofore appears in connection with the statement of grounds of jurisdiction of this Court.

(f)

A summary of the argument to be made is as follows:

As related to the exercise of sovereign powers of states as opposed to the exercise of Federal functions, the effect of the decisions of this Court is that the property, functions, and instrumentalities of the Federal Government are immune from direct state regulation, but that state laws and regulations are applicable to those dealing with the Federal Government (not acting as the agent thereof) when the laws and regulations accomplish a purpose in connection with the exercise by the state of its reserved powers, and are not in conflict with Federal laws, even though the exercise of such reserve powers may incidentally and indirectly burden the Federal Government; but where the application of the state law or regulation, as in this instance, is not necessary to the accomplishment of the only intended purpose of protecting the welfare of its citizens, and (1) its application interferes with the performance of Federal functions and (2) is in conflict with Federal laws and regulation, then the application of the state law or regulation is invalid.

(g)

ARGUMENT

I

The Arkansas Statute Directly Interferes With the Performance of Federal Functions and Cannot, Therefore, Under the Doctrine of Implied Inter-Governmental Immunity, Constitutionally Apply to Appellants' Activities Herein.

From *McCulloch* v. *Maryland*, 4 Wheat. 316 to *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110, and *Society for Savings etc.* v. *Bowers*, No. 204, October Term, 1954, decided May 16, 1955, 23 U. S. Law Week 4201, the basic doctrine that the properties, functions, and instrumentalities of the Federal Government are immune from state taxation has been consistently adhered to by the United States Supreme Court. Correlatively, the constitutional immunity of the properties, functions, and instrumentalities of the Federal Government from state regulation has similarly been firmly established. *United States* v. *Snyder*, 149 U. S. 210 (federal lien enforcible without compliance with state law requiring recordation and timely enforcement); *Ohio* v. *Thomas*, 173 U. S. 276; (state law requiring display of placard where oleomargarine is served not applicable to a federal soldiers' home); *Johnson* v. *Maryland*, 254 U. S. 51 (state licensing requirements inapplicable to driver of mail truck for United States Post Office); *Hunt* v. *United States*, 278 U. S. 96 (state restrictions inapplicable to federal agents in a national forest and game preserve); *Arizona* v. *California*, 283 U. S. 423 (plans and specifications for federal dam not subject to approval of state engineer); *United States* v. *Summerlin*, 310 U. S. 414, (obligation owed United States not debarred from presentation against a decedent's estate because not filed within time specified by state law); *Mayo* v. *United States*, 319 U. S. 441, (fertilizer shipped by United States to farmers

not subject to state inspection and stamp tax); see *Osborne* v. *United States Bank;* 9 Wheat 738, 867.

In contrast, the Supreme Court has wavered in its application of this principle to private parties who, in some manner, dealt with or acted for the Government. In earlier cases, it was held that, even without Congressional action, the income or possessions or transactions of such parties were also immune from state taxation. In more recent years, this doctrine of implied delegated immunity has been sharply curtailed. *Esso Standard Oil Co.* v. *Evans,* 345 U. S. 495; *Wilson* v. *Cook,* 327 U. S. 491; *Alabama* v. *King & Boozer,* 314 U. S. 1; *Curry* v. *United States,* 314 U. S. 14; *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466; *James* v. *Dravo Contracting Co.,* 302 U. S. 134.

These cases reject the earlier, now untenable, view that an independent contractor is clothed with governmental immunity solely because of his contractual relationship with the Federal, or a State, Government. As the Court pointed out, a tax imposed upon an independent contractor is not laid upon a government instrumentality. *James* v. *Dravo Contracting Co., supra; Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514. And although such taxes may result indirectly in an increased economic burden upon the Government to the extent that they are passed on by the independent contractor, "that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity." *Alabama* v. *King & Boozer, supra* at 9. By analogy to these tax cases, state regulation of independent contractors has also been sustained in the face of increased economic burdens

passed on indirectly to the Government by the independent contractors. *Penn Dairies* v. *Milk Control Commission*, 318 U. S. 261; *Stewart & Co.* v. *Sadrakula*, 309 U. S. 94; *Baltimore & Annapolis R. Co.* v. *Lichtenberg*, 176 Md. 383, 4 A 2d 734, appeal dismissed, 308 U. S. 525; cf. *Railway Mail Ass'n* v. *Corsi*, 326 U. S. 88, 95-96.

Tersely stated, the critical inquiry posed in these independent contractor cases is whether the state tax or regulation "interfere(s) in any substantial way with the performance of federal functions." *James* v. *Dravo Contracting Co.*, 302 U. S. at 161. The test has also been stated in these terms: Does the tax or regulation "in truth deprive (the independent contractors) of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power." *Railroad Company* v. *Peniston*, 18 Wall. 5, 36, quoted in *James* v. *Dravo Contracting Co.*, *supra* at 154-155; does it impair "in any substantial manner the ability of (independent contractors) to discharge their obligations to the (Government) or the ability of (the Government) or its subdivisions to procure the services of private individuals to aid them in their undertakings." *Metcalf & Eddy* v. *Mitchell*, 269 U. S. at 526. If there is substantial impairment, the state law necessarily falls, since "the authority of state laws or their administration may not interfere with the carrying out of a national purpose. Where enforcement of the state law would handicap efforts to carry out the plans of the United States, the state enactment must, of course, give way." *Stewart & Co.* v. *Sadrakula*, 309 U. S. at 103-104.

Viewed in this light, we submit that the Arkansas statute here involved is unconstitutional. Although the Act seemingly is not immediately addressed to the Government and purports only to regulate the activities of private con-

tractors, it directly impinges on the power of the Government to conduct vital federal functions.

To begin with, it burdens the Government in its selection of its agents. Sections 8 and 13 of the Act requires all contractors to apply for, obtain and record a license before they may bid upon any project whose cost is $20,000 or more. This requirement, without more, limits the Government's selection of contractors to those holding recorded licenses. The Government's choice is even further curtailed by the administrative barriers raised by the Act with respect to the licensing procedure. Section 4 provides that the licensing board shall have two regular meetings in each year; one in the month of February, and one in the month of August. Section 8 provides that written applications for examinations for licenses must be filed thirty days prior to such meetings. However, the Government cannot effectively function under a system whereby it issues invitations for bids during only these limited periods of the year, and this interval between the invitation and the bid is the 3-4 month period between application for license and action thereon by the Licensing Board. Consequently, unless it is assumed, contrary to fact, that the issuance of invitations to bid on Government projects and the time fixed for submitting bids pursuant thereto are so geared as to permit non-licensed contractors to meet these statutory requirements, it is obvious that, as a normal matter, the Government's contract awards must, if the Act may validly be applied, be limited to those few contractors who already had a license when the Government's invitation is issued, and who not only possess but have available the organization and equipment to commit to projects of the magnitude involved.

Nor is it any answer that out of state contractors may obtain licenses prior to the issuance of the invitation. While this is possible as a theoretical matter, it is not prac-

tically feasible. Since the type of invitations and the time of issuance thereof are typically not known in advance, the thousands of out of state contractors cannot be expected to obtain licenses in Arkansas merely for the privilege of possibly submitting a bid when and if there is issued an invitation for bids on a project they are equipped to perform.

That the Act imposes a real rather than hypothetical burden is apparent from the record. In each of the pending cases, it is admitted that "certain responsible contractors did not bid on the construction of these facilities, because they were not licensed to engage in the contracting business in Arkansas"—presumably for fear of prosecution under the Act. Further, although bids were received from licensed contractors, in each of the pending cases the lowest responsible bidder was not licensed. Insofar as the Act operates to eliminate a lowest responsible bidder, it must be conceded that the resulting higher cost thus incurred by the United States is not a fatal blow. What is critical here, however, is not the higher cost but the fact that the Act operates to restrict the Government in its free choice of its agents.

Second, the Act not only prohibits unlicensed contractors from even submitting bids but goes on to declare it to be a violation of the Act for such contractors to contract to construct or undertake to construct projects costing $20,000 or more (Sec. 13). The violation is declared to be a misdemeanor punishable by a fine of not less than $100 nor more than $200 for each offense, "each day to constitute a separate offense" (Sec. 13). Moreover, the Act empowers the licensing board to secure a writ of injunction for such violations "upon affidavit" and "without bond" (Sec. 17). Accordingly, seen from the viewpoint of the unlicensed contractor who has successfully bid on a Government contract, there can be no doubt that the Act substantially impairs his ability to perform his contrac-

tual obligations to the Government. Indeed, to point out that the Act hinders the unlicensed contractor from efficiently performing his work is grossly to understate the matter. In fact, the Act as implemented effectively precludes any performance of his contract.

Concomitantly, and of greater significance, these provisions of the Act necessarily frustrate the Government's attempt to carry out federal functions. The United States is told in so many words that if it contracts with an unlicensed contractor, the contractor will not only be subjected to a daily fine but will also be enjoined from executing the contract. Such action by the State of Arkansas squarely interferes with the carrying out of a national purpose.

Moreover, the Act does not stop there. It goes on to regulate the Government itself as well as the contractor. Section 18 requires the Government to include in its invitations to bidders and in its specifications a copy of the Act to convey to the invited bidder, whether or not he is a resident of the State, that he must have a license before his bid is considered. Plainly, this provision usurps the prerogative of Congress to specify the provisions of Government contract instruments. Finally, Section 13 bars the United States from bringing any action "either at law or in equity to enforce any provision of any contract entered into in violation of this act." In the light of this prohibition, any assumption that the Act's operation merely imposes an increased economic burden on the United States is clearly untenable. Read as a whole, it can only be concluded that the Act flatly prohibits the United States from effectuating national policy in Arkansas except on terms fixed by the State. So viewed, the Act must yield to overriding considerations of constitutional immunity.

In the final analysis, the doctrine of intergovernmental immunity rests upon the principle that "neither

government may destroy the other nor curtail in any substantial manner the exercise of its powers. Hence the limitation upon the taxing (or regulatory) power of each, so far as it affects the other, must receive a practical construction which permits both to function each with the other; and that limitation cannot be so varied or extended as seriously to impair the taxing (or regulatory) power of the government imposing the tax (or regulation) • • • or the appropriate exercise of the functions of the government affected by it." *Metcalf & Eddy* v. *Mitchell*, 269 U. S. at 523-524, quoted with approval in *James* v. *Dravo Contracting Co., supra* at 156-157. In the cases in which state regulation was upheld—*Baltimore & Annapolis R. Co.* v. *Lichtenberg, supra*; *Stewart & Co.* v. *Sadrakula, supra*; *Penn Dairies* v. *Milk Comm'n, supra* — it was possible to accommodate both ends. On the one hand, the purpose of the state regulation in those cases was to safeguard the health and safety of its citizens (*Stewart & Co.* v. *Sadrakula*, 309 U. S. at 104; *Penn Dairies* v. *Milk Control Comm'n*, 318 U. S. at 279-281); on the other hand, the state regulations did not substantially interfere with the performance of federal functions but merely increased the cost of the Government's operations.

Here, however, that same balance cannot be struck. It may be argued that this statute is also designed to protect the public health and safety in that the licensing board is required to consider the following qualifications of any applicant for a license: experience, ability, character, the manner of performance of previous contracts, financial condition, and equipment (Sec. 9). *Vis a vis* the federal Government, however, determination of such qualifications by the board is unnecessary for the public health and safety of Arkansas citizens. It cannot be seriously suggested that the United States is incompetent to pass upon the qualifications of its independent contractors. See *infra*, pp. 16-18. Moreover, the standard form provisions of gov-

ernment contracts, embodying statutory requirements, are designed to safeguard the interests of all citizens, including those of Arkansas. Article 11 of U. S. Standard Form No. 23-Rev. (41 U. S. C. App. § 54.13) provides for overtime pay for work in excess of eight hours daily. Article 17 requires the payment of prevailing wages, payment of wages not less than once a week without rebate on any account, posting of the scale of wages, and provides for termination for breach of these provisions. In addition, the contractor is required to give a bond for payment to all persons supplying labor and material in the prosecution of the work. See U. S. Standard Form No. 25-A, 41 U. S. C. App. § 54.16. In this light, it is apparent that striking down the statute here in question as applied to government contractors would not seriously impair the police power of the State nor prevent the Act's objectives from being realized.

On the other hand, looking at the obverse side of the coin, the operation of the Act does seriously impair the appropriate exercise of federal functions. As we have seen, the Act burdens the United States in its selection of its agents and in its relations with them. The Act makes it a misdemeanor for unlicensed contractors to bid upon, contract for, or undertake to construct a federal project; it authorizes the licensing board to obtain injunctions against unlicensed contractors; and it renders contracts with unlicensed contractors legally and equitably unenforcible. In *Penn Dairies* v. *Milk Control Comm'n, supra,* the Supreme Court pointed out that the government and its officers, under the state regulation there involved, "may purchase milk from whom and at what price they will, without incurring any penalty" (318 U. S. at 270). Here, however, the state regulation goes beyond merely increasing the cost to the Government and imposes restrictions which constitute a direct physical interference with federal activities and impose a "penalty" upon the United States. We sub-

mit, therefore, that the statute exceeds the constitutional bounds of state authority.

II

The Arkansas Statute Is Inconsistent With Federal Law Regulating Procurement by the United States and Therefore Cannot Constitutionally Apply to Such Procurement.

Up to this point, we have urged that the Arkansas statute is invalid because it violates the implied constitutional immunity of the functions of the United States from state regulation. But we need not rely here on an implied prohibition. As the Supreme Court has repeatedly recognized, state law must also yield if it conflicts with Congressional legislation, either as read in the light of its history or as construed by the executive officers charged with the exercise of the contracting power. *Franklin Nat. Bank* v. *New York*, 347 U. S. 373; *Carson* v. *Roane-Anderson Co.*, 342 U. S. 232; *Federal Land Bank* v. *Bismark Co.*, 314 U. S. 95; *Pittman* v. *Home Owners' Loan Corp.*, 308 U. S. 21; see *Penn Dairies* v. *Milk Control Comm'n.*, 318 U. S. at 271-278. There is, we submit, such a conflict here.

In *Penn Dairies*, the Supreme Court noted that it had long been the traditional procurement policy of the Government, embodied in a succession of statutes going back to 1809, that awards be made to the lowest responsible bidder after open competitive bidding. Competitive bidding was excused, however, where immediate performance was required by the public exigency or where it was impracticable to secure competition. 318 U. S. at 271-272. The most recent codification of Government procurement laws, the Armed Services Procurement Act of 1947 (Act of February 19, 1948, 62 Stat. 21, 41 U. S. C. 151 *et seq.*) reaffirms this traditional policy. The Act contemplates that the great majority of contracts for supplies and services will be placed through competitive bidding but that in a limited

number of situations the public interest requires that purchases be made by negotiation. See H. Rep. No. 109, 80th Cong., 1st Sess., p. 3; Sen. Rep. No. 571, 80th Cong., 1st Sess., p. 2. Recognizing that there may be more important factors than cost (Sen. Rep. No. 571, *supra*, p. 2), the Act places expanded authority and responsibility in the hands of those charged with the procurement function by spelling out the situations in which the exercise of judgment is permitted. Cf. *Kern-Limerick* v. *Scurlock*, 347 U. S. 110. Thus, in addition to those instances where the public exigency will not admit of the delay incident to advertising or where it is impracticable to secure competition, Section 2(c) of the Act (41 U. S. C. 151(c)) lists 15 other situations in which contracts may be negotiated without advertising.

In this light, were the issue here merely one of the validity of an increased economic burden on the United States because of the impact of the Arkansas statute, *Penn Dairies* would appear to be dispositive. The Armed Services Procurement Act of 1947, like the earlier procurement laws, is wholly consistent with the continued existence of local laws which affect the price of goods or services sold to the Government. But as we pointed out in Part I, *supra*, pp. 3-12, that is not the situation here. Our complaint is that the Arkansas statute attempts to regulate the Government's selection of its agents; that it prohibits the Government from determining for itself the most effective manner of performing vital federal functions.

As we have indicated, cost is not the dispositive factor under the Armed Services Procurement Act of 1947. Even where awards are to be made on the basis of competitive bidding, the guiding principle fixed by the Act is that the award be made "to that *responsible* bidder whose bid • • • will be most advantageous to the Government, price and *other* factors considered" (Sec. 3, 41 U. S. C.

152, emphasis added). Subordination of the cost factor is also evidenced by the Congressional declaration of policy in Section 2(b) (41 U. S. C. 151(b)) "that a fair proportion of the total purchases and contracts for supplies and services for the Government shall be placed with small business concerns." It is further demonstrated by the greatly expanded number of situations spelled out in Section 2(c) (41 U. S. C. 151(c)) in which procurement officials are authorized to depart from competitive bidding and to negotiate contracts in the public interest. The whole thrust of the Act is to do away with "the award of contracts in a purely mechanical way to the lowest bidder with no exercise of judgment or discretion on the part of the purchasing officer." Sen. Rep. No. 571, *supra*, p. 2. It rests upon the premise that "the exercise of judgment by the purchasing officer should not merely be permitted but should be encouraged." Sen. Rep. No. 571, *supra*, p. 3.

The Arkansas statute, however, places severe limitations upon this exercise of judgment and discretion. It tells Government procurement officers that they can contract only with those contractors approved by the Arkansas licensing board. Under the Arkansas statute, the Government can undertake no construction in that State with the agents it thinks best qualified to perform the job unless the State concurs in that judgment. If, in the opinion of the responsible federal procurement officials, contractors licensed by Arkansas are not as well qualified to carry out federal functions as out-of-state non-licensed contractors, those officials are faced with the choice of acting contrary to their considered judgment or of abandoning the construction of federal projects in Arkansas. Clearly, the Armed Services Procurement Act of 1947 precludes the State from posing such alternatives.

That the Arkansas statute conflicts with Congressional policy is further demonstrated by the pertinent regulations

issued under the Armed Services Procurement Act of 1947. Since these regulations have the force of law, their application in this case has no less force and effect than the specific directions of Congress. *Standard Oil Co.* v. *Johnson,* 316 U. S. 481, 484; *Johnson* v. *Yellow Cab Co.,* 321 U. S. 383, 389-390; cf. *Kern-Limerick Inc.* v. *Scurlock,* 347 U. S. 110.

Armed Services Procurement Regulation 400.301 (32 CFR 400.301) states that "it shall be the objective of each department to use that method of procurement which will be most advantageous to the Government—price, quality, and other factors considered." Expanding on these factors, Regulation 401.406-3 (32 CFR 401.406-3) provides, with respect to competitive bidding, that, besides price, procurement officials are to take into account *inter alia* the judgment, skill and integrity of the bidder; his reputation and experience; prior work of a similar nature done by him; and the advantages or disadvantages to the Government that might result from making multiple awards. With respect to negotiated contracts, Regulation 402.101 (32 CFR 402.101) requires contracting officers to give due attention to a minimum of 17 factors, including comparison of prices quoted; comparison of business reputations, capabilities and responsibilities of the respective firms who submit quotations; consideration of the quality of the supplies or services offered; consideration of delivery requirements; consideration of the size of the business concern; consideration as to whether the prospective supplier requires expansion or conversion of plant facilities; consideration of the extent of subcontracting; consideration of the existing and potential workload of the prospective supplier; and consideration of broadening the industrial base by the development of additional suppliers. See also to the same effect Army Procurement Regulation 590.357 (32 CFR 590.357).

Concomitantly, the regulations provide that certain firms and individuals will not be awarded contracts. Those made ineligible include firms and individuals found to have violated the Walsh-Healey Act (41 U. S. C. 37), the Davis-Bacon Act (40 U. S. C. 276a-2(a)), the Buy American Act (41 U. S. C. 10(b)); firms and individuals convicted in a court of competent jurisdiction of fraud or violation of the anti-trust laws; and firms and individuals found by clear and convincing evidence to have violated certain named contract provisions. See 32 CFR 400.600 to 400.608; 32 CFR 590.303 to 590.303-5.

Nowhere in these regulations is there any provision that procurement officials shall take into consideration in making awards the factor whether a firm has complied with local licensing requirements such as those involved here. Nor do the regulations provide that a non-licensed contractor is ineligible for Government contracts. The policy of these regulations is plain. They require contracting officers to exercise their judgment and discretion by giving due consideration to certain enumerated factors. Contract awards are to be made on the basis of these factors alone and not in a mechanical way. To the extent that the Arkansas statute precludes federal officials from effectuating their considered judgment in accordance with the regulations, it conflicts with an assertion of federal power and must yield.

In the instant cases, there is no question but that the contracts were awarded in accordance with the governing federal law and regulations, that responsible determinations were made that the national policy would be furthered by the award of these contracts to appellants rather than to other bidders licensed by the State of Arkansas. Acting pursuant to its statute, however, the State is attempting in these proceedings to nullify these determinations. The State's position is that the United States must employ a contractor approved by the State or forego the

performance of federal functions in Arkansas. The State, in effect, warns the Government that if the United States persists in determining for itself the means of implementing national policy, the State will prosecute the Government's agents, will enjoin them from performing their contracts and will prevent the United States from enforcing its contractual rights. Such action by the State can hardly be regarded as the normal permissible incidents of the operation within the same territory of a dual system of government. Plainly, the national procurement policy established by Congress is wholly inconsistent with the continued existence of these burdens. The Arkansas statute must, therefore, give way.

(h)

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the Supreme Court of Arkansas (R. 13) affirming the judgment of the Circuit Court of Pulaski County, Arkansas, First Division (R. 6) and its order (R. 15) denying appellant's petition for a rehearing (R. 14-15) should be reversed and the Supreme Court of Arkansas should be directed upon remand of the case, to enter judgment reversing the judgment of the Circuit Court of Pulaski County, Arkansas, and directing that Court upon remand of the case, to dismiss the information (R. 1-2) filed against this appellant.

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APPENDIX

(1) Act 124 of the Acts of the General Assembly of Arkansas for the Year 1939.

AN ACT to Regulate the Practice of General Contracting in the State of Arkansas: Creating and Establishing a State Licensing Board for General Contractors: Defining the Term "General Contractor," as Herein Used: Providing for the Appointment of Said Board, and for the Issuance of Licenses to General Contractors, as Well as for Said Board's Revocation of Said Licenses: Authorizing the Fixing of Reasonable Fees to Be Paid by Licensees for the Purpose of Defraying the Costs or Issuing Licenses Hereunder: Providing for Court Review of Adverse Ruling of Said Board: Prohibiting Engaging in Business as General Contractor Without First Complying With the Provisions of this Act: Fixing Penalties for the Violation of This Act; and Repealing All Laws, or Parts of Laws in Conflict Therewith, and for Other Purposes.

Be It Enacted by the General Assembly of the State of Arkansas:

SECTION 1. That for the purposes of this Act a "General Contractor" is defined to be any person, firm, partnership, co-partnership, association, corporation, or other organization, or any combination thereof, who for a fixed price, commission, fee or wage attempts to or submits a bid or bids to construct, or undertakes to construct, or assume charge of the construction, erection, alteration, repair, or have constructed, erected, altered, or repaired, under his, their or its direction, any building, highway, sewer, grading, or any improvement or structure when the cost of the undertaking is Ten Thousand Dollars ($10,000.00) or more, and one who shall engage in the construction or superintending the construction of any structure or any undertaking or improvements, as above mentioned in the State

of Arkansas, costing Ten Thousand Dollars ($10,000.00) or more, shall be deemed to have engaged in the business of general contracting in the State of Arkansas, provided that this definition shall not include architects or engineers, whose only financial interest in the projects shall be the architectural or engineering fees for preparing plans and specifications, surveys and supervision.

SECTION 2. That there is hereby created a State Licensing Board for General Contractors, consisting of five (5) members, who shall be appointed by the Governor. Each member shall be at least thirty-five (35) years of age, a resident of the State of Arkansas, and a general contractor of not less than ten (10) years' experience in responsible charge of construction projects of magnitude consistent with the duties of his office. At least one member of such Board shall have had as a larger part of his business the construction of highways. At least one member of such Board shall have had as a larger part of his business the construction of sewers and waterworks. At least one member of such Board shall have had as larger part of his business the construction of buildings. The members of the Board shall be appointed for one, two, three, four, and five years, respectively, their terms expiring on the 31st day of December of said year. Thereafter in each year the Governor shall appoint to fill the vacancy caused by expiration, for a term of five years. Each member shall hold over, after the expiration of his term, until his successor shall be duly appointed and qualified. If a vacancy shall occur in the Board for any cause, same shall be filled by appointment by the Governor, and the Governor may remove any member of the Board at any time for misconduct, incompetency or neglect of duty.

SECTION 3. That each member of the Board shall receive a certificate of appointment from the Governor, and, before entering upon the discharge of the duties of his

office, shall file with the Secretary of State the constitutional oath of office. Each member of the Board first created shall receive a license to operate as a general contractor under this Act from the Governor, and thereafter no one shall be eligible for appointment on the Board who does not at the time hold an unexpired license to operate as a general contractor in Arkansas under this Act, and who has not been a *bona fide* resident of Arkansas for the previous five (5) years, and at the time of appointment does not maintain his general office in Arkansas. The Board, or any Committee thereof, shall be entitled to the services of the Attorney General, or the Legal Department of the State, in connection with the operation of the affairs of the Board. Such additional legal counsel, however, may be employed by the Board from time to time as it may deem necessary.

SECTION 4. That the Board shall, within thirty (30) days after its appointment by the Governor, meet in the City of Little Rock at a time and place to be designated by the Governor, and at said meeting shall elect a Chairman, Vice-Chairman, and Secretary each to serve in his respective capacity for one year, and thereafter said officers shall be elected by said Board annually. Said Board shall have power to make such by-laws, rules, and regulations for its operation as it shall deem best; provided the same are not in conflict with the laws of the State of Arkansas. The Board shall adopt a seal for its own use. The seal shall have on it the words, "Arkansas State Licensing Board for General Contractors, Seal," and the Secretary shall have charge, care and custody thereof. That within sixty (60) days after the Board has been organized, it shall meet for the purpose of receiving applications for certificates to engage in the business of general contracting, and for the transaction of such other business as may come before it, and thereafter shall have two (2) regular meetings in each year; one in the month of February, and one in

the month of August, for the purpose of transacting such business as may properly come before it, or call of the Chairman of the Board. Special or adjourned meetings may be held at such time as the Board may provide by the by-laws which it shall adopt, or at such time as the Board may, by reasonable resolution, provide. Due notice of each meeting and the time and place thereof shall be given to each member in such manner as the by-laws shall provide. Three (3) members of the Board shall constitute a quorum. All meetings of the Board shall be held in Little Rock, Arkansas.

SECTION 5. The Secretary shall keep a record of the proceedings of said Board, and shall receive and turn over to the Treasurer of the State of Arkansas all moneys derived from the operation of this Act, and shall draw and certify all vouchers for expenses incurred by the Board. The said vouchers shall be countersigned by the Chairman of the Board, and drawn to the Auditor of the State of Arkansas who shall issue warrants to the Treasurer of the State of Arkansas for the payment of such certified expenses. All moneys received by the State Treasurer shall be kept by him as a separate fund styled "General Contractor's Fund." The Secretary shall give bond in such sum as the State Treasurer shall determine with such surety company as shall be approved by the State Treasurer, said bond to be conditioned upon the faithful performance of the duties of his office, and upon the faithful accounting of all moneys and other properties which shall come into his hands.

SECTION 6. That each member of the Board shall receive Ten Dollars ($10.00) per day while said Board is in session, and reimbursement for necessary traveling expense, board and lodging. The Board shall be further empowered to employ an Assistant Secretary who is qualified to report the proceedings had before and by the Board, and whose salary shall not exceed the sum of Eighteen

Hundred Dollars ($1,800.00) per year. All expenses incurred by the Board for Administration of this Act are hereby authorized to be paid by the Board.

SECTION 7. That the Secretary shall keep a register of all applications for license showing for each the date of application, name, qualification, place of business, place of residence, and whether the license was granted or refused, as well as a complete transcript of the proceedings, including evidence submitted by applicants, licensees, the Board, or otherwise, at any hearing. The books and register of this Board, including transcripts of proceedings, shall be *prima facie* evidence of all matters recorded therein, and a certified copy of such books or register, including transcript of proceedings, under the seal of the Board, attested by its Secretary, shall be received in evidence in all courts of the State in lieu of the original. A roster showing the names and places of business and of residence of all licensed general contractors shall be prepared by the Secretary of the Board as soon as convenient, and not more than ninety (90) days after the Board shall have organized, and during the month of January of each succeeding year. Such roster shall be ordered printed by the Board and paid for out of the funds herein appropriated for the operation of this Act. On or before the first day of March of each year, the Board shall submit to the Governor a report of its transactions for the preceding year, and shall file with the Secretary of State a copy of such report, together with a complete statement of receipts and expenditures of the Board attested by the affidavit of the Chairman and Secretary, and copy of said roster of licensed general contractors.

SECTION 8. That any one, other than members selected by the Governor as hereinbefore provided, hereafter desiring to be licensed as a general contractor in this State shall make and file with the Board thirty (30) days prior

to any regular or special meeting thereof, a written application on such form as may then be by the Board prescribed, for examination by the Board, said application to be accompanied by a certified check in the sum of Fifty Dollars ($50.00) payable to the Arkansas State Licensing Board for General Contractors. If said application complies with the Board's rules and regulations, then the applicant shall be entitled to an examination to determine his, their, or its qualifications. If the result of the examination of any applicant shall be satisfactory to the Board, then the Board shall issue to the applicant a certificate to engage in general contracting in the State of Arkansas. Any person thus receiving a certificate of license from the Board shall forthwith have it recorded in the office of the Secretary of State, and the date of recording shall be evidenced thereon. Until the license is recorded, the holder thereof shall not exercise any of the rights or privileges therein conferred, and in case such license is not recorded within sixty (60) days from the date of its issuance it shall become invalid. The Secretary of State shall be paid a fee of $1.00 for recording said certificate, and shall keep in a book to be provided by him for that purpose a complete list of certificate of license recorded by him, together with the date of each, and the date of recording. Any applicant failing to pass the examination prescribed by the Board shall be entitled to the refund of his, their or its fee accompanying the application. Any one failing to pass such examination may be re-examined at any regular meeting of the Board upon payment of regular fee. The certificate of authority to engage in the business of general contracting in the State of Arkansas shall expire the last day of December following the issuance or renewal, and shall become invalid on that date unless renewed. A fee of Fifty Dollars ($50.00) payable at the time of the filing of the application, as hereinbefore provided, shall be assessed against each applicant, and thereafter an annual

license fee in the sum of Fifty Dollars ($50.00) shall be paid by each Licensee to defray the costs and expenses of the operation of this Act.

SECTION 9. That the Board, in determining the qualifications of any applicant for original license, or any renewal license, shall, among other things, consider the following: (a) experience, (b) ability, (c) character, (d) the manner of performance of previous contracts, (e) financial condition, (f) equipment, (g) any other fact tending to show ability and willingness to conserve the public health and safety, and (h) default in complying with the provisions of this Act, or any other law of the State. A record shall be made and preserved by the Board of each examination of applicant or licensee, and the findings of the Board thereon, and a certified copy of the record shall be furnished to any applicant or licensee desiring to appeal from the findings of said Board, as hereinafter provided, upon payment of the costs of transcribing such record.

SECTION 10. That the Board shall have power to limit the license to that character of work for which the applicant is qualified.

SECTION 11. That the Board shall have the power to revoke the certificate of license of any general contractor licensed hereunder who is found guilty of any fraud or deceit in obtaining a license or for gross negligence, incompetence or misconduct in the conduct of his, their, or its business. Any person may prefer charges of such fraud, deceit, negligence or misconduct against any general contractor licensed hereunder. Such charge shall be in writing and sworn to by the complainant and mailed to the Board. Such charges, unless dismissed without hearing by the Board as unfounded or trivial, shall be heard and determined by the Board within thirty days after the date on which they were made. A time and place for such hearing shall be fixed by the Board and held in the City of Little

Rock, County of Pulaski, and State of Arkansas. A copy of the charges, together with the notice of the time and place of hearing, shall be considered as legally served by the Board when sent to the last known address of the accused by registered mail, at least ten days before the fixed date for the hearing, and in the event that such service cannot be effected ten days before such hearing; then the date of hearing and determination shall be postponed as may be necessary to permit the carrying out of this condition. At said hearing the accused shall have the right to appear personally and by counsel, and to cross-examine witnesses against him, them or it, and to submit evidence in his, their or its behalf and defense. If after said hearing the Board finds the facts as alleged and of such character as to disqualify the licensee, then the Board shall revoke the license of the accused, but in such event no refund shall be made of the license fee. The Board may, within its discretion and upon proper application or hearing, reissue a license to any person, firm or corporation whose license has been revoked. The Board shall immediately notify the Secretary of State of its findings in the case of a revocation of a license, or of a reissuance of a revoked license. A certificate of license to replace any certificate lost, destroyed or mutilated may be issued subject to the rules and regulations of the Board.

SECTION 12. That the issuance of a certificate of license by this Board shall be evidence that the person, firm or corporation named therein is entitled to all of the rights and privileges of a licensed general contractor while the said license remains unrevoked or unexpired.

SECTION 13. That any person, firm or corporation not being duly authorized, who shall engage or attempt to engage in the business of general contracting in this State, except as provided for in this Act, and any person, firm or corporation presenting or attempting to file as their

own the license certificate of another, or who shall give false or forged evidence of any kind to the Board, or to any member thereof, in obtaining a certificate of license, or who shall impersonate another, or who shall use an expired or revoked certificate or license, shall be deemed guilty of a misdemeanor, and shall be liable to a fine of not less than One Hundred Dollars ($100.00), nor more than Two Hundred Dollars ($200.00), for each offense, each day to constitute a separate offense.

SECTION 14. That in all prosecutions for violations of the provisions of this Act for engaging in the business of general contracting without a certificate of authority, it shall be sufficient to allege in the indictment, affidavit or complaint that "A. unlawfully engaged in business as a general contractor, without authority from the State Licensing Board for General Contractors so to do."

SECTION 15. That the following shall be exempted from the provisions of this Act: The practice of general contracting as defined in Section 1 of this Act by an authorized representative or representatives of the United States Government, State of Arkansas, incorporated town, city or county, or other political subdivision in this State.

SECTION 16. That a corporation or partnership may engage in the business of general contracting; provided, at least one of the principals of such corporation or partnership is in responsible charge of such business and is licensed as herein required of general contractors.

SECTION 17. That when any contractor not being licensed by this Board in accordance with the provisions of this Act, shall engage, or attempt to engage, in the business of general contracting as herein defined, the Board shall have the right to go into the proper court in the jurisdiction in which the work is being performed, and upon affidavit secure a writ of injunction, without bond, restrain-

ing and prohibiting the said contractor from performance of the work then being done, or about to commence.

SECTION 18. That all architects and engineers preparing plans and specifications for work to be contracted in the State of Arkansas shall include in their invitation to bidders and in their specifications a copy of this Act, or such portions thereof, as are deemed necessary to convey to the invited bidder, whether he is a resident of this State, or not, the information that it will be necessary for him to have evidence of a license before his bid is considered.

SECTION 19. That any party aggrieved by any decision of the State Licensing Board for General Contractors shall have the right to seek review thereof by filing a petition within thirty (30) days from the finding made by said Board before any division of the Circuit Court of Pulaski County, Arkansas, in which said aggrieved party shall set out in what respect the adverse action of the Board complained of is erroneous and prejudicial, and shall request the court to review the record of the findings of said Board. Upon trial duly had, the record of the examination and hearing by the Board shall be reviewed by the Circuit Court, and at the conclusion thereof the court shall either uphold the action of the Board or shall direct the granting of the application for license denied, or the reinstatement of the license revoked, as the case may be from which an appeal may be taken either by the applicant or by the Board to the Supreme Court as in other cases.

SECTION 20. That if any Section, sentence or provision of this Act shall be held unconstitutional, such holding shall not affect the remainder of the Act not in itself unconstitutional.

SECTION 21. That all laws or parts of laws in conflict herewith be, and the same are hereby, repealed.

SECTION 22. It is hereby determined and declared to be a fact that the practice of general contracting in the State of Arkansas is in need of regulation; that due to unethical practices, contractors within the State are being unduly penalized and are suffering irreparable injury, and this Act, being necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, and this Act shall take effect and be in force from and after its passage.

APPROVED: February 24, 1939.

(2) Act 217 of the Acts of the General Assembly of Arkansas for the Year 1945.

AN ACT to Amend Sections 7, 8, and 13 of Act 124 of the Acts of the General Assembly of the State of Arkansas for the Year 1939, Approved February 24, 1939, and for Other Purposes.

Be It Enacted by the General Assembly of the State of Arkansas:

SECTION 1. That Section 7 of Act 124 of the Acts of the General Assembly of the State of Arkansas for the year 1939, approved February 24, 1939, be, and the same is hereby amended to read as follows:

"SECTION 7. That the Secretary shall keep a register of all applications for license showing for each the date of application, name, qualification, place of business, place of residence, and whether the license was granted or refused, as well as a complete transcript of the proceedings, including evidence submitted by applicants, licensees, the Board, or otherwise, at any hearing. The books and register of this Board, including transcripts of proceedings, shall be *prima facie* evidence of all matters recorded therein, and a certified copy of such books or register, including transcript of proceedings, under the seal of the Board, at-

tested by its Secretary, shall be received in evidence in all courts of the State in lieu of the original. A roster showing the names and places of business and of residence of all licensed general contractors shall be prepared by the Secretary of the Board as soon as convenient, and not more than ninety (90) days after the Board shall have organized, and during the month of August of each succeeding year. Such roster shall be ordered printed by the Board and paid for out of the funds herein appropriated for the operation of this Act. On or before the first day of August of each year, the Board shall submit to the Governor a report of its transactions for the preceding year, and shall file with the Secretary of State a copy of such report, together with a complete statement of receipts and expenditures of the Board attested by the affidavit of the General Assembly of the State of Arkansas for the licensed general contractors."

SECTION 2. That Section 8 of Act 124 of the Acts of the General Assembly of the State of Arkansas for the year 1939, approved February 24, 1939, be, and the same is hereby amended to read as follows:

"SECTION 8. That any one, other than members selected by the Governor as hereinbefore provided, hereafter desiring to be licensed as a general contractor in this State shall make and file with the Board thirty (30) days prior to any regular or special meeting thereof, a written application on such form as may then be by the Board prescribed, for examination by the Board, said application to be accompanied by a certified check in the sum of Fifty Dollars ($50.00)payable to the Arkansas State Licensing Board for General Contractors. If said application complies with the Board's rules and regulations, then the applicant shall be entitled to an examination to determine his, their, or its qualifications. If the result of the examination of any applicant shall be satisfactory to the Board,

then the Board shall issue to the applicant a certificate to engage in general contracting in the State of Arkansas. Any person thus receiving a certificate of license from the Board shall forthwith have it recorded in the office of the Secretary of State, and the date of recording shall be evidenced thereon. Until the license is recorded, the holder thereof shall not exercise any of the rights or privileges therein conferred, and in case such license is not recorded within sixty (60) days from the date of its issuance it shall become invalid. The Secretary of State shall be paid a fee of $1.00 for recording said certificate, and shall keep in a book to be provided by him for that purpose a complete list of certificates of license recorded by him, together with the date of each, and the date of recording. Any applicant failing to pass the examination prescribed by the Board shall be entitled to the refund of his, their or its fee accompanying the application. Any one failing to pass such examination may be re-examined at any regular meeting of the Board upon payment of regular fee."

The certificates of authority to engage in the business of general contracting in the State of Arkansas issued in the year 1945 shall expire June 30, 1946, and thereafter all certificates of authority issued shall expire the last day of June following the issuance or renewal, and shall become invalid on that date unless renewed. A fee of Fifty Dollars ($50.00), payable at the time of filing the application as hereinbefore provided, shall be assessed against each applicant and thereafter an annual license fee in the sum of Fifty Dollars ($50.00) shall be paid by each Licensee to defray the cost and expenses of the operation of this Act.

SECTION 3. That Section 13 of said act 124 of the Acts of the General Assembly for the year 1939, be, and the same is hereby amended to read as follows:

"SECTION 13. That any person, firm or corporation not being duly authorized, who shall engage or attempt

to engage in the business of general contracting in this State, except as provided for in this Act, and any person, firm or corporation presenting or attempting to file as their own the license certificate of another, or who shall give false or forged evidence of any kind to the Board, or to any member thereof, in obtaining a certificate of license, or who shall impersonate another, or who shall use an expired or revoked ertificate or license, shall be deemed guilty of a misdemeanor, and shall be liable to a fine of not less than One Hundred Dollars ($100.00), nor more than Two Hundred Dollars ($200.00), for each offense, each day to constitute a separate offense." And provided further that no action may be brought either at law or in equity to enforce any provision of any contract entered into in violation of this Act.

SECTION 4. That all laws and parts of laws in conflict herewith are hereby repealed.

SECTION 5. Whereas, with the close of the present war a great revival in contracting in this State is anticipated, and with the increase in construction business a vast influx of contractors from other sections is anticipated. That it is vitally essential that the responsibility and experience of these contractors be known in order to prevent unfair competition and delay in construction of vitally needed facilities, therefore, this Act being necessary for the immediate preservation of the public peace, health and safety an emergency is hereby declared and this Act shall take effect and be in full force from and after its passage.

APPROVED: March 20, 1945.

No. 351

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SUPREME COURT OF THE UNITED STATES

LESLIE MILLER, INC. ..... *Appellant*

v.

STATE OF ARKANSAS ..... *Appellee*

APPEAL FROM
SUPREME COURT OF ARKANSAS

MOTION TO DISMISS

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> icy does not require. *Reconstruction Finance Corp.* v. *J. G. Menihan Corp.*, 312 U.S. 81, 85 L. ed. 595, 61 S. Ct. 485, and cases cited; *Colorado Nat. Bank* v. *Bedford*, 310 U.S. 41, 53, 84 L. ed. 1067, 1074, 60 S. Ct. 800, and cases cited; cf. *Baltimore Nat. Bank* v. *State Tax Commission*, 297 U.S. 209, 80 L. ed. 586, 56 S. Ct. 417. Our inquiry here, therefore, must be whether the state's regulation of this contractor in a matter of local concern conflicts with Congressional legislation or with any discernible Congressional policy."

Here, if in fact the State law burdens or interferes with the performance of the federal function as alleged, Congress has been free to alleviate the condition.

Appellant has selected various sections of the statute which, it alleges, directly affect the power of the government to act. These provisions in no manner burden the government and even so at most it "gives rise to a burden which is consequential and remote and not to one that is necessary, immediate or direct." *Trinityfarm Construction Co.* v. *Grosjean, supra.*

Appellant argues that requiring a license on projects exceeding $20,000 limits the government's selection to only licensed contractors; that the Board's meetings are too irregular; and, that applications must be filed 30 days prior to the meetings. Frankly we fail to see the burdensome aspect of these requirements. Appellant would have this Court believe that only a few out-of-State contractors are licensed. This simply is not true. Numerous out-of-State contractors are licensed, and no allegation of discrimination by the Board has been made. Appellant ignores the fact that contractors know of most jobs long before invitations to bid are released. Moreover, procurement regulations require that advertisements for bids be at a sufficient time previous to the contract to permit

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STATE OF ARKANSAS ..... *Appellee*

APPEAL FROM
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MOTION TO DISMISS

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal from the judgment of the Supreme Court of Arkansas in the above entitled cause be dismissed on the ground that the issues raised have been expressly passed on.

STATEMENT

As indicated by petitioner in its jurisdictional statement, this is a direct appeal from the final judgment of the Supreme Court of Arkansas rendered on July 4, 1955, in which the court affirmed a judgment of the Pulaski County, Arkansas, Circuit Court, First Division, which found petitioner guilty of violating the Arkansas Contractors Licensing Law, Act 124 of the Acts of Arkansas of 1939, as Amended, Sections 71-701, *et seq,* Arkansas Statutes of 1947 annotated.

Petitioner states that the statutory provision for jurisdiction of this appeal is Section 1257(2), 28 U. S. C. A. We submit that the State statute here invloved is not repugnant to the Constitution of the United States or any of the laws of the United States.

"such full and free competition as is consistent with the procurement of types of * * * services necessary to meet the requirements of the agency concerned". 41 USCA Sec. 152 (a). Then too, the United States recognizes the fact that the Board meets on an average of 18 times a year. (Amicus Curiae Brief p. 19.) Not one instance of abuse of discretion by the Board or undue delay has been cited. Any qualified contractor can become licensed in Arkansas within a 30- to 45-day period and we fail to see any burden attached to this procedure.

Appellant next argues that the statute operates to eliminate the lowest responsible bidder because that bidder is not licensed. This is a "back-door approach" and not logically sound because it assumes that unlicensed contractors will always be low bidders. This in effect, appellant says, will result in higher costs and further restrict the government in its choice of free agents. This choice of free agents argument is no different from the "economic burden" argument which this Court has many times rejected. In the Penn Dairies case, *supra*, this Court said:

> "By the exercise of control over the seller, the regulation imposes or may impose an increased economic burden on the government, for it may be assumed that the regulation if enforcible and enforced will increase the price of the milk purchased for consumption in Pennsylvania, unless the government is able to procure a supply from without the state, see *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U.S. 511, 79 L. ed. 1032, 55 S. Ct. 497, 101 ALR 55. But in this burden, if Congress has not acted to forbid it, we can find no different or greater impairment of federal authority than in the tax on sales to a government contractor sustained in *Alabama* v. *King & Boozer*, 314 U.S. 1, 86 L. ed. 3, 62 S. Ct. 43, 140 ALR 615, *supra;* or the state regulation of the operations of a trucking company in performing its contract with the government to transport workers em-

ARGUMENT

The Federal Question Presented Has Been Decided by This Court Adversely to Petitioner's Position

Petitioner sets out that the issue presented by this appeal is whether the conviction of petitioner for engaging in business as a contractor by submitting a bid to the United States and executing and performing a contract with the United States for military construction in Arkansas without first becoming licensed in Arkansas pursuant to the Arkansas Contractors Licensing Law was constitutional, when, (1) the objectives and purposes of the Arkansas law are afforded by Federal statutes and regulations; (2) the Arkansas law impairs the exercise of Federal functions; and (3) the Arkansas law is inconsistent with Federal laws regulating procurement. The authorities we rely upon are set forth in the opinion of the Supreme Court of Arkansas and clearly hold that the State statute here involved is a proper exercise of the police powers of the State for the protection of the public health, welfare and safety of the citizens of this State; that this statute does not impair the exercise of Federal functions; and, that it is not inconsistent with the Federal laws regulating procurement. Therefore it would serve no useful purpose to herein argue these authorities, and we respectfully submit that the appeal should be dismissed.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

LESLIE MILLER, INC., APPELLANT

v.

STATE OF ARKANSAS

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF FOR APPELLEE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

LESLIE MILLER, INC., APPELLANT

v.

STATE OF ARKANSAS

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

STATEMENT

Appellant is a non-resident general contractor which performed work in Arkansas pursuant to a contract with the United States Government on real property purchased by the government. The contract was for construction of facilities at the Air Force Base in Pulaski County, Arkansas, and amounted to $1,093,431.00 (R.14). It was stipulated that the United States had not accepted jurisdiction over the lands in Pulaski County as required by 40 USCA Sec. 255 (R.5).

Certain unlicensed contractors, undoubtedly acting on advice of counsel, did not offer bids for the job which appellant performed. A number of licensed contractors did bid for this job (R.6).

The Contractor's Licensing Board filed complaints against appellant pursuant to which the Prosecuting Attorney for Pulaski County filed an information on appel-

lant which set out two counts (1) submitting bids for and (2) contracting and performing work in connection with the aforesaid project without first procuring a license as required by the Arkansas law. Appellant was fined $100 on each count and appealed to the Supreme Court of Arkansas.

The Supreme Court of Arkansas affirmed the judgment. The Court held that the United States had not acquired jurisdiction over the land so as to exclude State regulation and rejected the argument that the State Statute was inapplicable under the doctrine of implied intergovernmental immunity. The Court said appellant was an independent contractor and was not clothed with governmental immunity merely because of its contractual relationship with the United States (R.9-12).

Appellant concedes in this appeal that the Supreme Court of Arkansas was correct in holding that the United States had not acquired jurisdiction so as to exclude State jurisdiction and has abandoned this argument. The remaining issues have been sufficiently stated by appellant.

ARGUMENT

I

The Arkansas State Licensing Law for Contractors Is Applicable and Its Enforcement as to Appellant Is Valid

In support of the contention that appellant may not constitutionally be convicted for entering into a contract with the United States for military construction in Arkansas without first becoming licensed pursuant to the Arkansas State Licensing Law for Contractors, appellant first argues that the Act's application interferes with the performance of federal functions and under the doctrine of implied intergovernmental immunity cannot apply to appellant's activities in Arkansas.

In making this contention appellant recognizes that this Court has many times held in certain tax cases that an independent contractor is not accorded governmental immunity merely because of his contractual relationship with the federal government. *Penn Dairies, Inc.* v. *Milk Control Commission,* (1942) 318 U.S. 261, 87 L. ed. 748; *James* v. *Dravo Contracting Co.,* (1937) 302 U.S. 134, 82 L. ed. 155, 114 ALR 318; *Metcalf & Eddy* v. *Mitchell,* (1925) 269 U.S. 514, 70 L. ed. 384; *James Stewart & Co., Inc.* v. *Katherine Sadrakula, Admrx.,* (1940) 309 U.S. 94, 84 L. ed. 596, 127 ALR 821; *Alabama* v. *King & Boozer,* (1941) 314 U.S. 1, 86 L. ed. 3. Appellant predicates its entire argument in this respect on certain tests which it alleges have been posed in these cases. We note that appellant quotes brief excerpts out of context as descriptive of what it considers the proper tests to be applied in determining the extent to which those who do business with the Federal Government may be regulated by the States. However,

appellant has not cited a single case in which this Court has struck down a state regulatory statute. No specific test has been laid down by this Court in these cases and theoretical assertions of interference with federal functions have not been entertained. To the contrary, primary considerations were stated by this Court in *Trinityfarm Construction Co.* v. *Grosjean*, (1934) 291 U.S. 466, 78 L. ed. 918, as follows:

> "Its application does not depend upon the amount of the exaction, the weight of the burden or the extent of the resulting interference with sovereign independence. Where it applies, the principle is an absolute one wholly unaffected by matters or distinctions of degree. *Indian Motorcycle Co.* v. *United States*, 283 U.S. 570, 575, 75 L. ed. 1277, 1281, 51 S. Ct. 601, and cases cited. Its right application is essential to the orderly conduct of the national and the state governments and the attainment of justice as between them."

Irrespective of whether the possibility of a fixed test exists in resolving the scope of the doctrine of implied immunity, it is certain that this Court has sharply limited the doctrine in recent years. In *Oklahoma Tax Com.* v. *Texas Co.*, (1949) 336 U.S. 342, 93 L. ed. 721, this Court said:

> "It is true that this Court's more recent pronouncements have beaten a fairly large retreat from its formerly prevailing ideas concerning the breadth of so-called intergovernmental immunities from taxation, a retreat which has run in both directions—to restrict the scope of immunity of private persons seeking to clothe themselves with governmental character from both federal and state taxation. The history of the immunity, by and large in both aspects, represents a rising or expanding curve, tapering off into a falling or contracting one."

Appellant's argument in this respect has been answered many times by this Court. We find in all of the applicable decisions the proposition that the Constitution has left Congress free to set aside local taxation and regulation of government contractors and that where Congress has not done so, any alleged burdens are the normal incidents of our dual system of government. In *James* v. *Dravo Contracting Co., supra,* this Court in answer to the "economic burden" argument said:

> "The argument ignores the power of Congress to protect the performance of the functions of the national government and to prevent interference therewith through any attempted state action. In *Thomson* v. *Union P. R. Co.*, 9 Wall. 579, 19 L. ed. 792, *supra*, the Court pointedly referred to the authority of Congress to prevent such an interference through the use of the taxing power of the State. 'It cannot', said the Court, 'be so used, indeed, as to defeat or hinder the operations of the National government; but it will be safe to conclude, in general, in reference to persons and State corporations employed in government service, that when Congress has not interposed to protect their property from State taxation, such taxation is not obnoxious to that objection'."

And in *Penn Dairies, Inc.* v. *Milk Control Commission, supra*:

> "Since the Constitution has left Congress free to set aside local taxation and regulation of government contractors which burden the national government, we see no basis for implying from the Constitution alone a restriction upon such regulations which Congress has not seen fit to impose, unless the regulations are shown to be inconsistent with Congressional policy. Even in the case of agencies created or appointed to do the government's work we have been slow to infer an immunity which Congress has not granted and which Congressional pol-

> ployed on a Public Works Administration project, upheld in *Baltimore & A. R. Co.* v. *Lichtenberg*, 176 Md. 383, 4 A(2d) 734, *supra;* or the local building regulations applied to a contractor engaged in constructing a post-office building for the government, sustained in *James Stewart & Co.* v. *Sadrakula*, ***."

Such an increase in cost and limitation of free agents, both of which are extremely remote, are not significant in resolving the applicability of the Act because here again this argument ignores the power of Congress to protect federal functions and prevent interference. *James* v. *Dravo Contracting Co., supra.*

Appellant has lifted the penal provisions and the Board's right of injunctive relief provision from the statute and insists that these impair the contractor's ability to perform his contract. Obviously this is true because that is the express purpose of these provisions, otherwise, the statute would have no legal sanction, and would be useless.

In the final analysis the over-all purpose of the statute is protection of public health and safety. It makes for a better group of competitive bidding contractors and protects the public and government as well.

In summary we believe that all of these contentions raised by appellant were adequately answered by this Court in the Penn Dairies case, *supra.* This Court there said:

> "The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself and governmental functions performed by its officers and agents. We have recognized that the Constitution presupposes the continued existence of the states functioning in co-ordination with the national government, with authority in the states

to lay taxes and to regulate their internal affairs and policy, and that state regulation like state taxation inevitably imposes some burdens on the national government of the same kind as those imposed on citizens of the United States within the state's borders, see *Metcalf & Eddy* v. *Mitchell, supra,* (269 U.S. 523, 524, 70 L. ed. 392, 393, 46 S. Ct. 172). And we have held that those burdens, save as Congress may act to remove them, are to be regarded as the normal incidents of the operation within the same territory of a dual system of government, and that no immunity of the national government from such burdens is to be implied from the Constitution which established the system, * * *."

II

The Arkansas Statute Applies Irrespective of Alleged Interferences with Federal Functions Because Arkansas Has Jurisdiction over the Land

Appellant has admitted that Arkansas has jurisdiction over the land in question and the United States has conceded that the Supreme Court of Arkansas' decision in this regard is plainly correct (Amicus Curiae brief p. 5, footnote 3). The only conclusion that can be drawn from this admitted fact is that the Arkansas Statute applies irrespective of alleged interferences and burdens.

In *Adams* v. *United States,* (1942) 319 U.S. 312, 87 L. ed. 1421, this Court stated that acquisition of title and surrender of jurisdiction by the State was not enough to confer jurisdiction upon the United States, and before the United States could acquire jurisdiction it must accept jurisdiction as required by 40 USCA Sec. 255. This Court further pointed out that it was the continuing confusion and controversy over the subject of state jurisdiction versus federal jurisdiction that caused Congress to adopt the Act of October 9, 1940. That was an amendatory act which provided in part:

> "Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted."

Thus a definite method of acceptance was created in order that all concerned could be apprised of whether the Government had obtained jurisdiction. Therefore, both Congress and this Court have told the Government in this case the procedure it should have followed to obtain jurisdiction. The Government has chosen to ignore this mandate and now seeks to tell the State of Arkansas which of her laws based on police power it wants enforced and which it does not.

III

The Arkansas Statute Is Consistent with Federal Laws Regulating Procurement Because Government Construction Contracts Require Compliance with State Licensing Laws

The Arkansas statute is not inconsistent with federal laws regulating procurement because the standard government construction contract requires that State licensing laws be complied with. U. S. Standard Form No. 23-Rev., 41 USCA, Appendix, Sec. 54.13, provides in part as follows:

> "Art. 10. Permits and responsibility for work. The contractor shall, without additional expense to the Government, obtain all required licenses and permits * * *"

This requirement is plain and specific. Appellant has searched the regulations at length to draw nice implications of congressional purpose. Here the intent of Congress is expressed and not implied. These procurement regulations have the force of law and appellant was required as a matter of law to comply with the State

Statute. Congress must have so intended, because it could have acted to change this requirement.

In addition to the foregoing, appellant's argument in connection with the Armed Forces Procurement Act of 1947 is not persuasive in the light of this Court's decision in the Penn Dairies case. Substantially the same argument was advanced in that case and the Court held:

> "An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous. Considerations which lead us not to favor repeal of statutes by implication, *United States* v. *Borden*, 308 U.S. 188, 198, 199, 84 L. ed. 181, 190, 191, 60 S. Ct. 182; *United States* v. *Jackson*, 302 U.S. 628, 631, 82 L. ed. 488, 491, 58 S. Ct. 390; *Posadas* v. *National City Bank*, 296 U.S. 497, 503-505, 80 L. ed. 351, 355, 356, 56 S. Ct. 349, should be at least as persuasive when the question is one of the nullification of state power by Congressional legislation.
>
> "Hence in the absence of some evidence of an inflexible Congressional policy requiring government-contracts to be awarded on the lowest bid despite noncompliance with state regulations other wise applicable we cannot say that the Pennsylvania milk regulation conflicts with Congressional legislation or policy and must be set aside merely because it increases the price of milk to the government. It would be no more than speculation for us to say that Congress would consider the government's pecuniary interest as a purchaser of milk more important than the interest asserted by Pennsylvania in the stabilization of her milk supply through control of price. Courts should guard against resolving these competing considerations of policy by imputing to Congress a decision which quite clearly it has not undertaken to make. Fur-

thermore we should be slow to strike down legislation which the state concededly had power to enact, because of its asserted burden on the federal government. For the state is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power, remains free to remove the burden."

Thus we see that even without the express provision of obtaining required licenses, this Court has refused to strike down a regulatory statute based on allegations of inconsistency with federal laws regulating procurement.

CONCLUSION

If appellant is not subject to the Arkansas State Licensing Law for Contractors, then Arkansas is without the power or right to maintain peace and order within her borders at a time when the United States Government has declined to accept that responsibility over its properties. The decision of the Supreme Court of Arkansas is correct and should be affirmed in every respect.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 793

LESLIE MILLER INC., APPELLANT

v.

STATE OF ARKANSAS

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

Appellant submitted a bid to the United States for the construction of certain facilities, at a cost of $1,093,431, on property owned by the United States in Arkansas. Being the lowest responsible bidder, appellant was awarded the contract. It executed the contract and began work. Appellant was convicted and fined for doing these acts without authority from Arkansas' Contractors Licensing Board, and thereby violating Act 124 of 1939, as amended (Ark. Stats. 1947, §§ 71–701 to 71–721).[1] The Arkansas Supreme Court affirmed.

[1] Act 124 of 1939, and the 1945 amendments to it, are printed in appellant's jurisdictional statement, pp. 14–27. Subsequent amendments, enacted in 1951 and 1953, are set out in our Appendix, *infra*, pp. 14–17.

The United States filed a brief as *amicus curiae* in the court below, arguing that the application of the state statute in the instant case is an unconstitutional interference with the operations of the Federal Government, and, moreover, is in conflict with the federal statutes and regulations governing procurement by the United States. We maintain the same position in this Court. The decision below goes beyond the bounds set by this Court for state regulation of independent contractors with the United States and seriously hampers the United States itself. Accordingly, we submit that probable jurisdiction should be noted.[2]

ARGUMENT

1. (a). The constitutional immunity from state regulation of the properties, functions, and instrumentalities of the Federal Government has been firmly established. *Mayo* v. *United States,* 319 U. S. 441; *United States* v. *Summerlin,* 310 U. S. 414; *Arizona* v. *California,* 283 U. S. 423; *Hunt* v. *United States,* 278 U. S. 96; *Johnson* v. *Maryland,* 254 U. S. 51; *Ohio* v. *Thomas,* 173 U. S. 276; *United States v. Snyder,* 149 U. S. 210; see *Osborn* v. *United States Bank,* 9 Wheat. 738, 867. This immunity, like the corollary immunity from state taxation, is necessary "in order to maintain the essential freedom of govern-

[2] In the event that probable jurisdiction is noted, the United States intends to file a brief as *amicus curiae*, urging that the judgment below be reversed.

ment in performing its functions." *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 149–50. Similarly, this Court has indicated that the dealings of the Federal Government with independent contractors are immune from state laws which "interfere in any substantial way with the performance of federal functions" (*James* v. *Dravo Contracting Co.*, 302 U. S. at 157, 161), or "handicap efforts to carry out the plans of the United States." (*Stewart & Co.* v. *Sadrakula*, 309 U. S. 94, 104). The states may not "deprive [independent contractors] of power to serve the government as they were intended to serve it" (*James* v. *Dravo Contracting Co.*, 302 U. S. at 154–155) nor "affect or embarrass in any substantial measure the power of the United States * * * to secure aid from independent contractors" (*Smith* v. *Davis*, 323 U. S. 111, 115).

The sole exception from this constitutional immunity which has thus far emerged from the Court's holdings permits state laws to impinge upon independent contractors where the sole impact upon the United States is economic and is merely reflected in increased costs. Thus, nondiscriminatory taxes upon federal contractors have been upheld even though the United States ultimately bears the costs of these taxes. *Esso Standard Oil Co.* v. *Evans*, 345 U. S. 495; *Curry* v. *United States*, 314 U. S. 14; *Alabama* v. *King & Boozer*, 314 U. S. 1; *James* v. *Dravo Contracting Co.*, 302 U. S. 134.

The same principle was involved when the Court sustained the application to federal contractors of a New York safety requirement for building construction (*Stewart & Co.* v. *Sadrakula,* 309 U. S. 94) and upheld Pennsylvania's minimum prices for milk (*Penn Dairies, Inc.* v. *Milk Control Comm'n,* 318 U. S. 261). In both these cases, the tax precedents were believed to govern because the sole impact on the United States was a possible increased economic burden. *Stewart & Co.* v. *Sadrakula,* 309 U. S. at 104; *Penn Dairies, Inc.* v. *Milk Control Comm'n.,* 318 U. S. at 269–70.[3]

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[3] In *Penn Dairies*, the Court pointed out that the state regulation of milk "imposes no prohibition on the national government or its officers. * * * As in the case of state taxation of the seller, the government is affected only as the state's regulation may increase the price which the government must pay for milk." 318 U. S. at 270.

The opinions in *Penn Dairies* and *Stewart* cite *Baltimore & Annapolis R. R. Co.* v. *Lichtenberg*, 176 Md. 383, 4 A. 2d 734, appeal dismissed, 308 U. S. 525, which involved state licensing and safety requirements applied to a trucking company under contract with the United States. Appeal was dismissed for want of a substantial federal question, citing cases on the general validity of motor vehicle regulation, without regard to the instant immunity problem. 308 U. S. 525. In *Stewart*, when the Court followed *Baltimore & Annapolis*, it considered that case as involving safety provisions analogous to those in *Stewart*, which imposed only an economic burden on the Government. 309 U. S. at 104. The Court has thus never ruled directly upon the problem of a licensing statute which, aside from an economic burden, limits the operations of the United States.

The Arkansas Supreme Court relied in the instant case upon these authorities and the analogy of the tax cases. But here, as the following analysis of the Arkansas statute shows, the effect upon the United States is not only to increase its costs but to prevent it from making a free choice of contractors to build facilities in Arkansas. The Constitution does not allow Arkansas to interfere in this way with the function of the Federal Government.

(b). The Arkansas Act requires all contractors to be licensed before they may bid, contract, or undertake any project in Arkansas whose cost is $20,000 or more (Sections 1, 13). Such acts by an unlicensed contractor are declared to be misdemeanors punishable by fine (Section 13) and the licensing board is empowered to secure injunctions restraining performance in violation of the Act (Section 17). All invitations for bids and specifications must include a copy of the Act to indicate that a license is required before a bid will be considered (Section 18). A contract entered into by an unlicensed contractor is declared unenforceable at law or in equity (Section 13). Plainly, an unlicensed contractor is not able to carry out work for the Federal Government in Arkansas or even to bid for it.

Consequently, if the decision below stands, the United States must choose for its construction work in Arkansas only state-licensed contractors.

This is, in itself, a serious restriction, for the Government may often wish to open the bidding to contractors not already licensed; indeed, it may be essential to do so where a proposed federal facility has had no previous counterpart in the state. If non-licensed contractors are to be solicited, the burdensome procedure is as follows: The Arkansas licensing board has two regular meetings a year, in February and August, aside from special meetings under its bylaws or resolutions (Section 4). Written applications for examinations for licenses must be filed thirty days prior to meetings of the board (Section 8). The United States must, therefore, issue its invitation for bids more than thirty days before the board's February and August meetings, or a special meeting. And it must keep the invitation open for the several-months interval between application and license before it may validly, under Arkansas law, receive bids from all responsible contractors.

The instant case reveals how seriously such compliance would interfere with construction for the Federal Government in Arkansas. The Government invited bids on this contract about April 6, 1954. On May 12, 1954, after bids were received from one Arkansas firm and 15 out-of-state firms, the Government contracted with appellant, the lowest responsible bidder. The one-month interval between invitation and award did not coincide with any of the regular meetings of the licensing board and was, in any event, too

short for any application for a license to be acted upon by the board. It was for that reason, we presume, that, as stipulated here, some responsible contractors did not bid because they were unlicensed.

We believe that under the Constitution the Federal Government is free to decide when it wishes to construct facilities, who shall be its contractor, and how fast a project shall proceed. Other states, besides Arkansas, have licensing provisions for contractors, and if they are to apply to contractors for the United States the Government's freedom to act will be severely curtailed.[4] For these reasons, we submit that the decision below unduly hinders the performance of federal functions and therefore that the Arkansas statute exceeds the constitutional bounds of state authority.

2. Aside from the constitutional immunity protecting the Federal Government's activities, the application of the Arkansas statute conflicts with specific federal legislation and regulations governing procurement by the United States. As this

[4] In New Mexico and Arizona, an even longer interval is required between invitation and award, if a contract is to be open to all responsible contractors. Applicants for a license are required to have maintained an office in the state for at least 90 days preceding the application; and this may be disregarded only when the applicant is a specialty contractor and there are less than ten contractors operating in the state who are licensed for his specialty. Ariz. Code 1939 (1952 Supp.), Sec. 67-2306; N. M. Stat. 1953, Sec. 67-16-5.

Court has recognized, Congress can preclude state regulation of instrumentalities and contractors utilized by the Federal Government. *Franklin National Bank* v. *New York*, 347 U. S. 373; *Carson* v. *Roane-Anderson Co.*, 342 U. S. 232; *Federal Land Bank* v. *Bismarck Co.*, 314 U. S. 95; *Pittman* v. *Home Owners' Loan Corp.*, 308 U. S. 21; see *Penn Dairies, Inc.* v. *Milk Control Commission*, 318 U. S. 261, 269, 271–78. We submit that Congress has done so here.

A comprehensive scheme of procurement policies is found in the Armed Services Procurement Act of 1947 (Act of February 19, 1948, 62 Stat. 21, 41 U. S. C. 151 *et seq.*), and the regulations under it (32 CFR c. I (A), V (G), VII (J) (1954)), which have the force of law. *Standard Oil Co.* v. *Johnson*, 316 U. S. 481, 484; *Johnson* v. *Yellow Cab Co.*, 321 U. S. 383, 389–90; cf. *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110.

The standards with which federal officials are directed to comply, and the judgments they are expected to exercise, are laid out in some detail. The Act contemplates that the great majority of contracts for supplies and services will be placed through competitive bidding but that, in certain situations, the public interest requires that purchases be made by negotiation. Sections 2 (c), 3, 41 U. S. C. 151 (c), 152; See H. Rep. No. 109, 80th Cong., 1st Sess., p. 3; S. Rep. No. 571, 80th Cong., 1st Sess., p. 2. The Act sets forth 16 situations in which contracts may be negotiated

without advertising, including instances where the public exigency will not allow delay, where it is impracticable to secure competition, where it is in the interest of the national defense that a particular plant be kept available, etc. Section 2 (c) (1)–(16); 41 U. S. C. 151 (c) (1)–(16). It is also declared to be the policy of Congress that a fair proportion of contracts be placed with small business concerns. Section 2 (b), 41 U. S. C. 151 (b).

Even when awards are made on the basis of competitive bidding, cost is not the dispositive factor. The guiding principle is that the award be made "to that responsible bidder whose bid * * * will be most advantageous to the Government, price and other factors considered" (Section 3, 41 U. S. C. 152). Armed Services Procurement Regulations 1.307, 2.406–1 (32 CFR 1.307, 2.406–1) define a "responsible bidder" as one with adequate financial and technical resources, and a satisfactory record of performance, integrity, judgment and skills. Expanding upon the factors to be considered, Regulation 2.406–3 (32 CFR 2.406–3) provides that, besides price, procurement officials in considering bids are to take into account, *inter alia,* the judgment, skill and integrity of the bidder; his reputation and experience; prior work of a similar nature done by him; and the advantages or disadvantages to the Government that might result from making multiple awards. When contracts are negotiated,

Regulation 3.101 (32 CFR 3.101) requires contracting officers to give due attention to a minimum of 19 factors there listed. See also Army Procurement Regulations 590.301, 590.357 (32 CFR 590.301, 590.357).[5]

The Act and regulations thus required the federal procurement officials involved in the instant contract to exercise their judgment and discretion by giving due consideration to certain enumerated factors. See S. Rep. No. 571, 80th Cong., 1st Sess., pp. 2–3. And there is no question but that the contract was awarded to appellant in accordance with the governing federal law and regulations. In the opinion of the responsible officials, the bidding contractors licensed by Arkansas were not as well qualified to carry out the federal program as appellant, an out-of-state contractor not licensed by Arkansas. Nevertheless, Arkansas has sought to nullify the award and restrict the United States to contractors licensed by it. It would compel the federal officials to abandon their considered judgment in choosing appellant or to

[5] Concomitantly, the regulations provide that certain persons will not be awarded contracts. Those made ineligible include firms and individuals found to have violated the Walsh-Healey Act (41 U. S. C. 37), the Davis-Bacon Act (40 U. S. C. 276a–2 (a)), the Buy-American Act (41 U. S. C. 10b); firms and individuals convicted in a court of competent jurisdiction of fraud or violation of the anti-trust laws; and firms and individuals found by clear and convincing evidence to have violated certain named contract provisions. See 32 CFR 1.600 to 1.609; 32 CFR 590.600–50 to 590.609.

abandon the construction of this federal project in Arkansas. In our view, the Armed Services Procurement Act of 1947, and the regulations pursuant thereto, preclude the state from posing such alternatives. The Arkansas statute cannot validly apply to contractors with the Federal Government.

In *Penn Dairies, Inc.* v. *Milk Control Comm'n.*, 318 U. S. 261, the Court considered whether a state's minimum price regulation conflicted with the federal procurement statutes and regulations. It held that the statutes were "wholly consistent" with acceptance of local price regulation since Congress specifically excused competitive bidding when it was "impracticable to secure competition," into which category state price regulation was deemed to fall (318 U. S. at 272–273, 277), and because numerous other provisions negated an inflexible policy of taking the lowest bid (318 U. S. at 273–75; see *supra*, pp. 9–10). Furthermore, the Army's regulations were found to have explicitly left the applicability of state price legislation to be determined by the courts (318 U. S. at 276–78).

There is, however, no provision of statute or regulation which can be adduced to support the subordination of federal procurement to the instant Arkansas statute. Here, the result would not be an adjustment in price terms and increased cost, as in *Penn Dairies*, but a nullification of the Federal Goverment's choice of contractor. The

State, in effect, warns the Government that if the United States persists in determining for itself the means of implementing national policy, the State will prosecute the Government's agents, will enjoin them from performing their contracts, and will prevent the United States from enforcing its contractual rights. The national procurement policy established by Congress is wholly inconsistent with the continued existence of these burdens. The Arkansas statute must, therefore, give way.

3. Finally, the Arkansas statute does not represent a state regulatory policy to which federal officials should bow out of deference to local interests. This again distinguishes the case from *Stewart & Co.* v. *Sadrakula,* 309 U. S. 94, and *Penn Dairies, Inc.* v. *Milk Control Comm'n.,* 318 U. S. 261, in which the local regulation safeguarded the health and safety of New York and Pennsylvania citizens while merely increasing the cost of federal operations. See 309 U. S. at 104; 318 U. S. at 279–81.

It may be argued that the Arkansas licensing statute is designed to protect the public health and safety in that the licensing board is required to consider, among the qualifications of any applicant for a license, his experience, ability, character, manner of performance of previous contracts, financial condition and equipment (Section 9). But this provision is paralleled by the comparable requirements of the federal procurement

law. It cannot be seriously suggested that the United States is incompetent to pass upon the qualifications of its independent contractors nor that it fails to do so. See *supra*, pp. 8–10. Moreover, the standard form provisions of government contracts embody statutory requirements which are designed to safeguard the interests of all citizens, including those of Arkansas. See U. S. Standard Form Nos. 23–Rev., 25–A, 41 U. S. C. App. 54.13, 54.16. And cf., with respect to fraud and misconduct, Section 11 of the Arkansas Act; 32 CFR 1.604–1, 590.604. The Arkansas statute does not establish any higher qualifications or standards than the federal law. It is apparent, therefore, that striking down this state statute, as applied to Government contractors, would not seriously impair the police power of the State nor prevent its objectives from being realized. Striking down the statute is necessary, however, to permit the realization of the Federal Government's objectives and program.

CONCLUSION

For these reasons, it is respectfully submitted that probable jurisdiction should be noted.

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APRIL 1956.

APPENDIX

Act 153 of Arkansas Acts 1951 provides:

AN ACT to Amend Sections 1 and 6 of Act 124, Approved February 24, 1939; to Amend the Second Unnumbered Paragraph of Section 71-708, Arkansas Statutes, 1947, and to Amend Section 13 of Act 124 of 1939, as Amended by Section 3 of Act 217, Approved March 20, 1945.

Be It Enacted by the General Assembly of the State of Arkansas:

SECTION 1. Section 1 of Act 124 of the Acts of the General Assembly, approved February 24, 1939, is hereby amended to read as follows:

"SECTION 1. For the purposes of this act a 'contractor' is defined to be any person, firm, partnership, co-partnership, association, corporation, or other organization, or any combination thereof, who for a fixed price, commission, fee or wage attempts to or submits a bid or bids to construct, or contracts or undertakes to construct, or assumes charge, in a supervisory capacity or otherwise, of the construction, erection, alteration or repair, or has or have constructed, erected, altered, or repaired, under his, their or its direction, any building, highway, sewer, grading or any other improvement or structure, when the cost of the work to be done, or done, in the State of Arkansas by the contractor, including but not limited to labor and materials, is twenty thousand dollars ($20,000.00) or more.

"Architects and engineers, whose only financial interest in a project shall be the architectural or engineering fees for pre-

paring plans, specifications, surveys and such supervision as is customarily furnished by architects and engineers, are specifically excluded from this act.

"Wherever the term 'general contractor' shall appear in this act it shall mean 'contractor', as hereinbefore defined, and wherever the term 'general contracting' shall appear in this act it shall mean 'contracting.'"

SECTION 2. Section 6 of Act 124, approved February 24, 1939, is hereby amended to read as follows:

"SECTION 6. Each member of the Board shall receive fifteen dollars per day while the Board is in session, and reimbursement for necessary traveling expense, board and lodging. The Board shall have the power to employ an assistant secretary at not more than two hundred dollars per month; an attorney-investigator at not more than three hundred dollars per month; two senior clerks at not more than one hundred seventy-five dollars per month each; and, two junior clerks at not more than one hundred thirty-five dollars per month each. All expenses incurred by the Board for the administration of this act are hereby authorized to be paid by the Board; provided, however, no funds may be expended for the purpose of purchasing or constructing a building or any portion of a building."

SECTION 3. The second unnumbered paragraph of Section 71–708, Arkansas Statutes, 1947, is hereby amended to read as follows:

"All certificates of license to engage in the business of contracting in the State of Arkansas shall expire the last day of June following the issuance or renewal thereof, and shall become invalid on that day unless

renewed. A fee of $50.00, payable at the time of filing the application, shall be assessed against each applicant and thereafter an annual renewal license fee to be determined by the Board but not to exceed $50.00 shall be paid by each licensee to defray the costs and expenses of the administration of this Act."

SECTION 4. Section 13 of Act 124, approved February 24, 1939, as amended by Section 3 of Act 217, approved March 20, 1945, is hereby amended to read as follows:

"SECTION 13. Any contractor who for a fixed price, commission, fee or wage, attempts to or submits a bid or bids to construct, or contracts to construct, or undertakes to construct, or assumes charge, in a supervisory capacity or otherwise, of the construction, erection, alteration or repair, of any building, highway, sewer, grading, or any other improvement or structure, when the cost of the work to be done by the contractor, including but not limited to labor and materials, is $20,000.00 or more, without first having procured a license to engage in the business of contracting in this State, or who shall present or file the license certificate of another, or who shall give false or forged evidence of any kind to the Board, or any member thereof, in obtaining a certificate of license, or who shall impersonate another, or who shall use an expired or revoked certificate of license, shall be deemed guilty of a misdemeanor, and shall be liable to a fine of not less than $100.00 nor more than $200.00 for each offense, each day to constitute a separate offense. No action may be brought either at law or in equity to enforce any provision of any contract entered into in violation of this act. The doing of any act

or thing herein prohibited by any applicant or licensee shall in the discretion of the Board constitute sufficient grounds to refuse a license to an applicant or to revoke the license of a licensee."

SECTION 5. The State Licensing Board for General Contractors shall be known hereafter as the "Contractors Licensing Board," and wherever the name "State Licensing Board for General Contractors," or the word "Board," shall appear in Act 124, approved February 24, 1939, or acts amendatory thereof, such name and word shall mean "Contractors Licensing Board." The Board shall adopt a seal for its use which shall have on it the words "State of Arkansas Contractors Licensing Board."

SECTION 6. If for any reason any provision of this act shall be held to be invalid it shall not affect the validity of the remainder of this act.

Approved February 23, 1951.

Act 245 of Arkansas Acts 1953 provides:

AN ACT to Fix Maximum Salaries for Certain Employees of the Contractors Licensing Board and to Limit the Number of Such Employees to Be Employed by the Board in Such Positions.

Be It Enacted by the General Assembly of the State of Arkansas:

SECTION 1. The Contractors Licensing Board is hereby authorized to employ an Assistant Secretary at a salary of not more than $300.00 per month; one Senior Clerk at a salary of not more than $275.00 per month; and two Junior Clerks at a salary of not more than $200.00 per month each.

SECTION 2. All laws and parts of laws in conflict herewith are hereby repealed.

Approved March 6, 1953.

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QUESTIONS PRESENTED

Appellant, constructing airfield facilities in Arkansas under a Government contract awarded pursuant to its bid, was convicted of violating an Arkansas statute which requires contractors to obtain a license from the Contractors Licensing Board of Arkansas before they may bid upon, contract for, or perform any construction project in Arkansas in the amount of $20,000 or more. The questions presented are:

1. Whether the doctrine of intergovernmental immunity forbids the application of the Arkansas licensing statute to contractors with the Federal Government because it results in substantial interference with the federal functions of selecting contractors and planning construction.

2. Whether the application of the Arkansas licensing requirement in this case is invalid because in conflict with the federal procurement legislation and regulations thereunder, prescribing the criteria for selecting federal contractors.

STATUTES AND REGULATIONS INVOLVED

Act 124 of Arkansas Acts 1939, as amended, Arkansas Statutes 1947, Sections 71–701 to 71–721, is set forth in Appendix A, *infra*, pp. 34–45. The pertinent provisions of the Armed Forces Procurement Act of 1947, 62 Stat. 21, 41 U. S. C. 151, *et seq.*, and of the Armed Services Procurement Regulations are set forth in Appendix B, *infra*, pp. 46–53.[1]

[1] Appendix C, *infra*, pp. 54–64, consists of the rules and regulations of the Arkansas Contractors Licensing Board, promulgated under the above statute, as well as the prescribed forms for material, which must be filed by applicants for a license—application, affidavit, statement of experience and financial condition.

STATEMENT

On or about May 11, 1954, appellant Leslie Miller, Inc., submitted a bid to the United States for the construction of certain facilities, at a cost of $1,093,431, on land in Arkansas owned by the United States (R. 1, 4). Appellant was awarded the contract, which was executed on May 12, 1954 (1–2, 4). On or about June 1, 1954, appellant began work (R. 2, 4).

The contract awarded appellant was for the construction of aircraft fueling facilities at Little Rock Air Force Base, Little Rock, Arkansas, including pipe lines, heavy and medium bomber refueling systems, bulk fuel storage facilities, etc. The United States distributed invitations to bid, dated April 8, 1954, to 32 firms located in Arkansas and 126 out-of-state firms. Bids were received from one Arkansas firm and 15 out-of-state firms, including appellant, a Fort Worth, Texas company. Of these 16 bidders, only 7 were then licensed by Arkansas. The 9 nonlicensed companies had their general offices in California, Indiana, Montana, New York, South Carolina and Texas.

On September 30, 1954, the Prosecuting Attorney of Pulaski County, Arkansas, filed in the local state court a two-count information charging that, when appellant (1) submitted the bid and (2) executed the contract and began work, it unlawfully engaged in business as a contractor without authority from the Arkansas Contractors Licensing Board, the state agency established by Arkansas law (Act 124 of 1939, as amended, Arkansas Statutes 1947, Sections 71–701 to 71–721, *infra*, pp. 34–45), to issue licenses for such activities (R. 1–2). Appellant was found guilty of

violating the state statute and was fined $100 on each of the two counts (R. 6–7).

According to the stipulation of facts entered into by the parties, the United States received on this contract, in addition to appellant's bid, bids from contractors who were licensed by the Arkansas Contractors Licensing Board.[2] However, appellant was the lowest responsible bidder and the contract was awarded to it as "required by applicable federal statutes and administrative regulations" (R. 5). Certain responsible bidders did not bid because they were not licensed to engage in the contracting business in Arkansas (R. 6).

On appeal to the Supreme Court of Arkansas, the United States filed a brief as *amicus curiae,* urging that the application of the state statute in the instant case was an unconstitutional interference with the operations of the Federal Government and, moreover, was in conflict with the federal statutes and regulations governing procurement by the United States. The Arkansas Supreme Court affirmed the judgment of conviction (R. 9–12). It held, first, that the

[2] The companion cases before the Arkansas Supreme Court (R. 9–12) involved three additional contracts awarded by the United States to two other Texas firms (Tecon Corporation, and Ramsey and Leftwich) and a Chicago firm (Engineering Construction Corporation), not licensed by Arkansas. These contracts were in the total amount of $5,460,000 for airfield paving and construction of a warehouse at the Little Rock Air Force Base and for the construction of National Guard facilities at the Fort Smith Municipal Airport, Fort Smith, Arkansas, which include a hangar, warehouse, motor service shop, water and fuel systems, etc. By agreement among the parties, the disposition of these cases will be controlled by this Court's decision in this case.

United States had not acquired jurisdiction over the land on which the contract was performed so as to exclude state regulation (R. 10–11).[3] Second, the court rejected the contention that the state statute was inapplicable "under the doctrine of implied intergovernmental immunity" (R. 11). The court pointed out that appellant was an independent contractor, not an agent or representative of the United States, and that "[t]he United States Government is not a party to this suit" (R. 12). It held that an independent contractor is not "clothed with governmental immunity" because of its contract with the United States, and cited decisions which sustained state taxes upon government contractors and state regulation of contractors "in the face of increased economic burdens passed on indirectly to the Government by the independent contractors" (R. 12).

SUMMARY OF ARGUMENT

I

A. The immunity of the functions of the United States from state interference is an essential element of the federal system. Under this principle, this Court has struck down a variety of state laws seeking to interfere with the Federal Government or persons carrying out a federal program. To be sure, the modern decisions have sustained state taxes on federal contractors, as well as state regulations resulting

[3] This portion of the decision below is plainly correct (*Adams* v. *United States*, 319 U. S. 312; 40 U. S. C. 255) and is not questioned by the appellant or the United States on this appeal. Appellant raised a contention in regard thereto in the court below (R. 10), but has abandoned the contention in this Court.

solely in a non-discriminatory increase in cost to the United States, on the theory that such indirect, non-discriminatory economic burdens could not interfere with federal functions. But this Court has consistently distinguished these economic burdens from state laws which would "interfere in any substantial way with the performance of federal functions" and hence would be invalid (*James* v. *Dravo Contracting Co.*, 302 U. S. 134, 157, 161).

The Arkansas Supreme Court erroneously relied upon the cases involving merely indirect economic burdens in sustaining the imposition of the state licensing requirement on federal contractors. Failing to take account of the distinction between a non-discriminatory increase in costs and a direct, substantial interference with federal programs, the court erred because it did not appraise the impact of the state licensing law upon the United States and did not consider whether the result was a "substantial interference."

B. The Arkansas statute unconstitutionally interferes with the functions of the Federal Government by forbidding contractors to bid upon, contract for, or undertake the performance of any project in Arkansas costing $20,000 or more, without a license from the State's Contractors Licensing Board. In addition, the statute permits the enjoining of any such work by an unlicensed contractor and declares his contracts unenforceable by either party thereto. Thus, the Act, if applicable here, would plainly limit the power of the Federal Government "to secure aid from independent contractors" (*Smith* v. *Davis*, 323 U. S. 111,

115) and "deprive [certain contractors] of power to serve the government" (*James* v. *Dravo Contracting Co.*, 302 U. S. 134, 154–55). Under the statute, only state-licensed contractors could bid on government construction in Arkansas, an unreasonable restriction upon the Government, especially since the nature of a federal project may require special skills, beyond the competence of Arkansas-licensed contractors. And the prescribed procedure for issuing licenses in Arkansas, particularly the requirements for filing applications 30 days before a meeting of the Board and for Board examination of applicants, will often operate, as it did here, to prevent interested unlicensed contractors from qualifying in time to submit bids. Consequently, the practical effect of the statute will often be to place the Government in the position either of abandoning any attempts to choose the best possible contractor for work in Arkansas or of foregoing any speedy letting of contracts for such work even though, as is frequently the case in military construction, time may be of the essence. The states lack power to erect barriers like this against congressionally-authorized federal operations.

II

Aside from the inherent constitutional immunity of the United States, we submit that Congress has affirmatively exercised its recognized power to preclude the kind of restrictions Arkansas has attempted to impose upon federal procurement activity. The Armed Services Procurement Act of 1947 and the regulations under it set forth detailed standards un-

der which federal officers must exercise a carefully defined discretion in awarding contracts. Specific conditions govern the use of competitive bidding. Besides price, numerous other factors are to be considered and the contract must be awarded "to that responsible bidder whose bid * * * will be most advantageous to the Government, price and other factors considered." Section 3, Armed Services Procurement Act, 41 U. S. C. 152.

The instant contract was awarded in accordance with the applicable criteria laid down in the federal statute and regulations. Nevertheless, Arkansas claims the power to block it because appellant was not licensed by the State Board. In *Penn Dairies, Inc.* v. *Milk Control Commission,* 318 U. S. 261, 270, sustaining a state minimum-price regulation as applied to federal purchases, this Court pointed out that the regulation left federal officers free to select those with whom they would contract and the terms of the contracts. Here, in contrast, Arkansas has undertaken to nullify the determination of a federal contracting officer that appellant was the best contractor to construct the Federal project. Such state interference conflicts squarely with the express direction of Congress and must fail.

Finally, there is here no overriding local policy to which federal law should defer. There is no local need in this case comparable to that which figures so largely in the tax cases; the Federal Government's freedom to choose contractors is no threat to the fiscal soundness of the states. Furthermore, it can hardly be doubted that the requirements of the fed-

eral procurement law provide whatever local protection might be afforded by the State Board's judgment upon the qualifications of a contractor.

ARGUMENT

I

ARKANSAS' LICENSING STATUTE CANNOT BE CONSTITUTIONALLY APPLIED IN THIS CASE BECAUSE IT DIRECTLY INTERFERES WITH THE FEDERAL GOVERNMENT'S POWER TO CHOOSE CONTRACTORS AND TO SCHEDULE CONSTRUCTION IN ARKANSAS

A. THE IMMUNITY OF THE UNITED STATES ATTACHES TO FEDERAL CONTRACTORS TO THE EXTENT NECESSARY TO PROTECT FEDERAL FUNCTIONS

The constitutional immunity from state regulation of the properties, functions, and instrumentalities of the Federal Government has long been firmly established. As an "unavoidable consequence of that supremacy which the constitution has declared" (*McCulloch* v. *Maryland*, 4 Wheat. 316, 436), this Court has struck down a variety of state regulations which transgressed the Federal Government's immunity.[4]

[4] *E. g.*, *Mayo* v. *United States*, 319 U. S. 441 (fertilizer distributed under federal program not subject to state inspection and stamp tax); *Arizona* v. *California*, 283 U. S. 423 (plans and specifications for federal dam not subject to approval of state engineer); *Hunt* v. *United States*, 278 U. S. 96 (federal agents in national forest and game preserve not restricted by state laws); *Johnson* v. *Maryland*, 254 U. S. 51 (driver of United States mail truck not subject to state licensing requirements); *Ohio* v. *Thomas*, 173 U. S. 276 (federal soldiers' home not subject to state law requiring display of placard where oleomargarine is served); *United States* v. *Snyder*, 149 U. S. 210 (federal lien enforceable regardless of state recording and time limitations).

The immunity is necessary "in order to maintain the essential freedom of government in performing its functions." *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 149–150. It is fundamental that "[t]he United States may perform its functions without conforming to the police regulations of a State." *Arizona* v. *California*, 283 U. S. 423, 451.

Originally, the scope of intergovernmental immunity from taxation as well as regulation was very broad. This broad immunity in the tax field stemmed from the Marshall court's belief that the power to tax was, by its nature, a destructive burden—a view which found expression in language treating state taxes along with fines or penalties as equivalent unlawful interferences with federal instrumentalities and contractors. *E. g.*, *McCulloch* v. *Maryland*, 4 Wheat. 316, 436; *Osborn* v. *United States Bank*, 9 Wheat. 738, 867. As a consequence, the Federal Government's immunity from state taxation was then considered to extend to income, property or transactions of many persons outside the Government who in some manner dealt with or acted for the Government. See cases collected in *United States* v. *Allegheny County*, 322 U. S. 174, 176–177, n. 1.

The earlier view of the tax immunities inherent in our federal system has been sharply curtailed in a modern series of decisions, which opened the way for state taxation of government contractors (*James* v. *Dravo Contracting Co.*, 302 U. S. 134), government employees (*Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466), and government lessees (*Oklahoma Tax Commission* v. *Texas Co.*, 336 U. S. 342; cf. *Helver-*

ing v. *Producers Corp.*, 303 U. S. 376). This curtailment is based on the view that an indirect, nondiscriminatory economic burden does not interfere with the United States, but is merely "the normal incident" of the coexistence of two taxing authorities in a federal system. *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. at 487; *Helvering* v. *Producers Corp.*, 303 U. S. at 386–87; *James* v. *Dravo Contracting Co.*, 302 U. S. at 156–57, 160; see *Penn Dairies* v. *Milk Control Commission*, 318 U. S. at 270–71.[5]

But while reformulating the doctrine of intergovernmental tax immunity, the Court has left otherwise intact the principle that the states cannot "retard, impede, burden, or in any manner control" the Federal Government (*McCulloch* v. *Maryland*, 4 Wheat. at 436). The sole exception from constitutional immunity which has emerged, as far as contractors with the Federal Government are concerned, is that of permitting state laws to impinge upon such contractors where the impact upon the United States is solely economic and is merely reflected in increased costs.

[5] In the landmark cases of the last twenty years, the United States supported the restrictions on federal tax immunity and strongly urged that federal contractors and employees should be held to be constitutionally taxable by the states. *James* v. *Dravo Contracting Co.*, 302 U. S. at 149; *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 472–75; see also *Smith* v. *Davis*, 323 111, 112; *Alabama* v. *King & Boozer*, 314 U. S. 1, 8–9. See particularly the Government's briefs *amicus* in *Dravo*, No. 3, Oct. Term, 1937, pp. 22–37, and *Graves*, No. 478, Oct. Term, 1938, pp. 72–81, suggesting that no burden was imposed upon the Government by such taxation.

This concept has been used in sustaining nondiscriminatory state taxes on federal contractors. *Esso Standard Oil Co.* v. *Evans*, 345 U. S. 495 (privilege tax); *Smith* v. *Davis*, 323 U. S. 111 (property tax on open account); *Curry* v. *United States*, 314 U. S. 14 (sales tax); *Alabama* v. *King & Boozer*, 314 U. S. 1 (sales tax); *James* v. *Dravo Contracting Co.*, 302 U. S. 134 (gross receipts tax).[6] The same principle was applied when the Court sustained the application to federal contractors of a New York safety requirement for building construction (*Stewart & Co.* v. *Sadrakula*, 309 U. S. 94) and when it held that Pennsylvania's minimum prices for milk controlled sales to a United States Army camp (*Penn Dairies, Inc.* v. *Milk Control Commission*, 318 U. S. 261). In both these cases, the tax precedents were found to govern because the sole impact on the United States was a possible increased economic burden. 309 U. S. at 104; 318 U. S. at 270.[7]

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[6] On the other hand, the Court has refused to sanction state taxes imposed directly on the United States itself or its property. See fn. 14, *infra*, p. 24.

[7] The opinions in *Penn Dairies* and *Stewart* cite *Baltimore & Annapolis R. R. Co.* v. *Lichtenberg*, 176 Md. 383, appeal dismissed, 308 U. S. 525, which involved state licensing and safety requirements applied to a trucking company under contract with the United States. Appeal was dismissed for want of a substantial federal question, citing cases on the general validity of motor vehicle regulation, without regard to the instant immunity problem. 308 U. S. 525. In *Stewart*, when the Court followed *Baltimore & Annapolis*, it considered the latter case as involving safety provisions analogous to those in *Stewart*, which imposed only an economic burden on the Government. 309 U. S. at 104. The Court has thus never ruled directly upon the problem of a licensing statute which, aside from an economic burden, directly limits the operations of the United States.

At the same time that it has allowed the states to impose such economic burdens upon the United States, indirectly through its contractors, the Court has consistently treated differently those situations in which state law, if held applicable, would impair or obstruct the attainment of federal objectives. In the broadest terms, the Court has indicated that the Federal Government's dealings with independent contractors are immune from state laws which "interfere in any substantial way with the performance of federal functions" (*James* v. *Dravo Contracting Co.*, 302 U. S. at 157, 161), or "handicap efforts to carry out the plans of the United States" (*Stewart & Co.* v. *Sadrakula*, 309 U. S. 94, 104). The states may not "deprive [independent contractors] of power to serve the government as they were intended to serve it" (*James* v. *Dravo Contracting Co.*, 302 U. S. at 154–155, quoting *Railroad Company* v. *Peniston*, 18 Wall. 5, 36; *Smith* v. *Davis*, 323 U. S. 111, 116), or "affect or embarrass in any substantial measure the power of the United States * * * to secure aid from independent contractors" (*Smith* v. *Davis*, *supra*, at 115; cf. *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 526). See *Osborn* v. *United States Bank*, 9 Wheat. 738, 867.

In the present case, the Arkansas Supreme Court did not attempt to appraise the impact of the state licensing statute upon federal activities. Rather, it summarily disposed of the immunity question by brief reference to the decisions which have allowed state taxation and regulation of Government contractors resulting only in increased economic burdens passed

on to the United States.[8] In relying on these authorities, the court below failed to take note of the clear distinction, formulated by the decisions of this Court, between taxation and analogous regulation imposing only economic burdens and, on the other hand, state regulatory schemes which interfere with or obstruct in a substantial way the performance of federal functions. As we shall now show, the Arkansas Contractors' Licensing Act falls in the latter class, and the Arkansas court therefore erred in holding that the statute could validly be applied to contractors with the United States.

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[8] The Arkansas Supreme Court cited several cases, in addition to *Penn Dairies* and *Stewart*, as dealing with state regulation of federal contractors (R. 12). Some of these merely reiterate the theory that indirect economic burdens on the United States are valid; others seem to be irrelevant.

Thus, *Ralph Sollitt & Sons Construction Co.* v. *Commonwealth*, 161 Va. 854, appeal dismissed, 292 U. S. 599, involved a non-discriminatory tax on a federal contractor and the contention, irrelevant here (see p. 5, fn. 3, *supra*), that the project was undertaken on land within exclusive federal jurisdiction. In *E. E. Morgan Co.* v. *State*, 202 Ark. 404, the federal contractor, a foreign corporation, was penalized for doing business without being domesticated under state law. It apparently urged only the economic burden, which the state court properly rejected (202 Ark. at 408), and this Court dismissed the appeal, citing *Stewart* and the tax cases. 314 U. S. 571.

In *Railway Mail Association* v. *Corsi*, 326 U. S. 88, the Court held that a New York law prohibiting racial and religious discrimination in labor organizations was validly applied to an organization of postal clerks. The Court saw no interference of any kind—economic or otherwise—with the United States' operation of the mails. See fn. 9, *infra*, p. 17.

Ohio River Contract Co. v. *Gordon*, 244 U. S. 68, involved the irrelevant and insubstantial claim by a federal contractor that a state court had no jurisdiction over it in an ordinary tort action because of its contract relation with the United States or because it was on land within exclusive federal jurisdiction.

B. THE ARKANSAS STATUTE SERIOUSLY IMPEDES OR WHOLLY BLOCKS THE FEDERAL GOVERNMENT IN INVITING BIDS AND SELECTING CONTRACTORS

In our view, it is plain that the Arkansas statute substantially interferes with a federal function. It constricts the power of the Federal Government "to secure aid from independent contractors" (*Smith* v. *Davis*, 323 U. S. 111, 115) and "deprives [certain contractors] of power to serve the government" (*James* v. *Dravo Contracting Co.*, 302 U. S. 134, 154–55). Its effect, as applied in this case, is to compel the Federal Government, when planning construction in Arkansas, to use only contractors who have been approved by the State Board. Although the statute is undoubtedly intended in part as a measure of protection for persons dealing with contractors, when the United States seeks to construct facilities for itself, the Constitution shields it from such intervention or "protection" by other members of the federal system.

The Arkansas Act requires that a contractor be licensed before he "attempts to or submits a bid or bids to construct, or contracts to construct, or undertakes to construct, or assumes charge, in a supervisory capacity or otherwise, of the construction, erection, alteration or repair" of any project whose cost is $20,000 or more (Section 13, App. A, *infra*, pp. 42–43). Such acts by an unlicensed contractor are declared to be misdemeanors punishable by fine of from $100 to $200 for each offense, each day constituting a separate offense (Section 13). The Licensing Board

is empowered to secure injunctions, upon affidavit and without bond, restraining performance of any work in violation of the Act (Section 17, App. A, *infra*, p. 44). All invitations for bids and specifications for work to be contracted in Arkansas must include a copy of the Act to notify invited bidders that a license is required before a bid will be considered (Section 18, App. A, *infra*, p. 44). A contract entered into by an unlicensed contractor is declared unenforceable at law or in equity (Section 13, App. A, *infra*, p. 43).

Plainly, if the statute is applicable, an unlicensed contractor would not be able even to bid on a contract with the Federal Government in Arkansas, let alone carry out the work. This is made clear by the fact that, under the regulations of the Contractors Licensing Board, each applicant for a license must file an affidavit that he is not a party to any contract in Arkansas for work in the amount of $20,000 or more, that he has no outstanding bid for work in Arkansas in the amount of $20,000 or more, and that he will not bid on any such work until his application is acted upon and a license is granted him. App. C, *infra*, p. 56.

Consequently, under the decision below, the United States must choose for its construction work in Arkansas only state-licensed contractors. This is in itself an unconstitutional restriction, for the Government must be free to select its contractors. Cf. *Smith* v. *Davis*, 323 U. S. 111, 114; *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 526; *Railway Mail Ass'n* v.

Corsi, 326 U. S. 88, 95–96.* The Government may often wish, as it did in this case and the companion cases before the Arkansas Supreme Court (fn. 2, *supra,* p. 4), to open the bidding to contractors not already licensed. Indeed, it may be essential to do so where a proposed federal facility has no previous counterpart in the state, or requires special skills beyond the competence of Arkansas licensed contractors.

For instance, in the present case the contract was for the construction of aircraft fueling facilities, including pipe lines, heavy and medium bomber refueling systems and bulk fuel storage facilities. See *supra,* p. 3. Special skills were required. While invitations were distributed to 32 firms located in Arkansas and 126 out-of-state firms, only 16 bids were received, and of these 16 bids, 9 were from construction companies not licensed by Arkansas at that time, including appellant (of Fort Worth, Texas) and others located in California, Indiana, Montana, New York, South Carolina, and Texas. The effect of the holding below is to restrict the Government's choice of contractor to the seven bids from the Arkansas-licensed contractors.

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* In *Railway Mail Ass'n* v. *Corsi,* when the Court held that federal interests could not possibly be hampered by a New York law prohibiting discrimination in membership by an organization of postal clerks (f. 8, *supra,* p. 14), the Court stated that the law "does not impinge on the federal mail service or the power of the government to conduct it. *It does not burden the government in its selection of employees or in its relations with them.* Nor does it operate to define the terms of that federal employment or relate to any aspect of it" (326 U. S. at 95–96). [Emphasis added.]

The onerous and improper character of this attempted restriction upon the Federal Government is accentuated by the fact that the state licensing procedure makes compliance almost impossible for a contractor found most suitable by federal officials but not already licensed by Arkansas. Under the statute, the Arkansas Licensing Board holds two regular meetings a year, in February and August, with special meetings as provided for in the Board's bylaws or resolutions (Section 4; App. A, *infra,* pp. 36–37). Written applications for examinations for licenses must be filed thirty days prior to meetings of the Board (Section 8, App. A, *infra,* pp. 39–40), and there is no provision for waiver of the 30-day period. If the application complies with the Board's rules and regulations, the applicant is entitled to an examination of his qualifications. If the result of the examination is satisfactory, the Board will, when a meeting is held, issue a certificate to engage in general contracting in Arkansas. Anyone failing the examination may be reexamined, but only at a regular meeting of the Board (Section 8).

Accordingly, if the Act applies to federal contractors, the United States, if it wishes to receive bids from contractors generally, must so time the issuance of its invitation for bids as to come more than thirty days before the Board's February and August meetings, or a special meeting. In addition, it must keep the invitation open for what may be a several-month interval between application and license-issuance before it will be in a position, as a practical matter, to award the contract. This is true even if contractors

previously licensed in Arkansas turn out to be the most competent to do the work. For since the statute prohibits even the submission of a bid before a license is obtained, the Government will be unable to compare the alternative contractors, examining their estimates and abilities, until sufficient time has elapsed for all interested contractors to apply for and obtain their licenses and thereafter to submit their bids.

The facts of the instant case concretely demonstrate the effect of this licensing obstacle upon federal construction in Arkansas. The Government's invitation in connection with the construction work here involved, issued on April 8, 1954, provided that the bids would be opened on May 11, 1954.[10] The one-month interval between the invitation and the opening did not coincide with any of the regular meetings of the Licensing Board [11] and, in any event, was too short to

[10] The additional three contracts involved in the companion cases before the Arkansas Supreme Court (fn. 2, *supra*, p. 4) provided the following time periods between invitations and opening of bids:

(1) January 29, 1954, to March 18, 1954 (Tecon Corporation);

(2) March 12, 1954, to April 13, 1954 (Engineering Construction Corporation);

(3) April 13, 1954, to May 13, 1954 (Ramsey and Leftwich).

[11] The rules and regulations promulgated by the Board provide that special meetings may be called by the chairman or a majority upon 48 hours notice to the members (*infra*, p. 54). We have been advised that special meetings are ordinarily called when ten or more applications are pending, or, upon fewer applications when other business requires it, and that the Board meets on the average 18 times a year. However, since the Board considers the 30-day period between application and meeting to be mandatory and non-waivable, a minimum of 6 weeks elapses between application and issuance of a license, and the usual time for such action is longer.

obtain a license under the prescribed statutory procedures.

The interval between invitation and award was only a few days more than the statutory 30-day waiting period which must elapse and which is considered mandatory before the Arkansas Board will meet to consider applications. But prospective bidders need time after invitations are issued to decide whether they are sufficiently interested in the contract to apply for a license. Later, if a contractor proposes to bid and seeks to comply with the Arkansas statute, time is needed for the Arkansas Board to meet, examine, and issue licenses. Only after these delays would the contractor be able to submit his bid. Thus, if the state statute is applicable, this contract could not possibly have been let on May 12, 1954, to a contractor who, prior to the issuance of the invitation, was not already licensed. That is to say, the contract could not have been made and performed as the federal officers, unquestionably acting under the federal statute and regulations governing their action, made and performed this contract.

In the same way, other facts in this case reveal vividly the direct conflict between federal and state authority. It is stipulated (R. 6) that only about one-tenth of the contractors solicited submitted bids and, most significantly, some responsible contractors did not bid because they were unlicensed. *Supra*, pp. 3–4. Thus, the state statute effectively deprived the Government of bids from contractors to whom the Government might well have preferred to have awarded the contract. Again, it is clear that the effect

of the statute is to compel the United States to choose a state-licensed contractor and abandon any attempt to canvass all qualified contractors, or, in the alternative, to forego speedy letting of contracts in Arkansas. While the letting of contracts may feasibly be delayed in some instances to permit contractors to apply for and be issued licenses, time obviously is of the essence in many, if not most, military construction projects.[12] Where this is so, the Arkansas statute would prevent the Government from having the work done by an unlicensed contractor even though none of the licensed contractors were in fact capable of performing the work as required.

A further obstruction to the Government's choice of contractor is the statute's requirement that a license be issued only upon the applicant's passing of an examination. A contractor who fails the examination may be re-examined only at a regular meeting of the Board, *i. e.*, in February or August. Section 8, App. A, *infra*, p. 40. We are advised that, at present, the Board does not conduct any written or oral examination but satisfies itself with consideration of a lengthy statement of experience and financial condition, which is filed with the application, attested by the applicant, and supported by an audit by certified public accountants. See App. C, *infra*, pp. 55*ff*. Thus, if the Arkansas statute applies to federal contractors, the Fed-

[12] We are advised that the Army's prevailing practice is to permit 30 days to intervene between invitation and opening; however, the interval may be reduced to as little as ten days when necessary because of climatic considerations, meeting of other contract scheduling or military priority, to list a few of the reasons.

eral Government's choice of a contractor may be not only delayed but completely blocked by the State Board's rejection of the contractor's application.

Such rejection would go far beyond any merely economic burden on the United States. For the federal choice of a contractor is not a mechanical process of picking the lowest bidder. The contracting officer is under a duty to weigh the qualifications, experience and estimates of all bidders and then to award the contract "to that responsible bidder whose bid * * * will be most advantageous to the Government, price and other factors considered." Section 3, Armed Services Procurement Act of 1947, 41 U. S. C. 152, App. B, *infra,* p. 49. The federal statutes and regulations establish standards for procurement which, as we shall show, *infra,* pp. 25–32, affirmatively preclude any interjection of state licensing laws in the field of federal contracts. But they also emphasize the constitutional bar, for they demonstrate that the federal officers have one essential duty—to carry out the federal program expeditiously, prudently and effectively—and that the effect of the state statute is substantially to interfere with the discharge of this duty.

Nothing in this Court's decisions indicates that such interference is to be countenanced. The state tax cases, of course, involve only economic burdens, and the resulting cost increase to the United States is the "normal incident" of a federal system. Neither the storage of Government-owned aviation gasoline (*Esso Standard Oil Co.* v. *Evans,* 345 U. S. 495) nor the construction of an army airport (*Smith* v. *Davis,* 323 U. S. 111), an army camp (*Alabama* v. *King &*

Boozer, 314 U. S. 1) and locks and dams (*James* v. *Dravo Contracting Co.*, 302 U. S. 134) were affected or hampered in any substantial or essential way by the taxes in the cited cases. The same is true of the regulatory provisions which had solely economic consequences for the construction of a post office (*Stewart & Co.* v. *Sadrakula*, 309 U. S. 94) or the purchase of milk (*Penn Dairies* v. *Milk Control Commission*, 318 U. S. 261). The United States, in all these cases, had the untrammelled power to decide when and how each project would be undertaken, who would be its contractor, and how fast it would proceed. See *supra*, pp. 10–12.

The Arkansas statute, on the other hand, would substantially hamper the Government either in its choice of contractors or in its control over the schedule of construction. Other states, besides Arkansas, have licensing provisions for contractors. If these are to apply to contractors for the United States, the Government's freedom to act will be severely curtailed.[13] The application of such statutes to federal contractors is a substantial interference with federal functions and as a consequence is precluded by the Constitution.

[13] In New Mexico and Arizona, an even longer interval is required between invitation and award, if a contract is to be open to all responsible contractors. Applicants for license are required to have maintained an office in the state for at least 90 days preceding the application; and this requirement may be disregarded only when the applicant is a specialty contractor and there are less than ten contractors operating in the state who are licensed for this specialty. Ariz. Code 1939, Sec. 67–2306 (1952 Supp.); N. M. Stat. 1953, Sec. 67–16–5.

It is true but immaterial that, as the court below observed (R. 12), the United States is not a party in this case and that Arkansas has here prosecuted only the contractor. It remains none the less clear that the State has impeded the Federal Government's power "to secure aid from independent contractors" (*Smith* v. *Davis*, 323 U. S. 111, 116), and this is decisive of the invalidity of the state action.[14]

Moreover, the Arkansas licensing statute imposes direct restrictions upon those who employ contractors as well as upon the contractors themselves, rendering even more clearly inconsequential the fact that the United States is not a party to this particular case. The Act requires the inclusion in all invitations for

[14] The state court's reliance on the fact that the United States is not a party represents a clear misapplication of the tax immunity decisions. In the tax field, since an indirect economic burden upon the United States is now permissible (*supra*, pp. 10–12), constitutional objections arise only if the tax falls directly upon the "possessions, institutions, and activities of the Federal Government itself." *United States* v. *Allegheny County*, 322 U. S. 174, 177. Consequently, taxes with the same economic effect are held valid or invalid depending upon the immediate incidence. Compare *Alabama* v. *King & Boozer*, 314 U. S. 1, with *Kern-Limerick, Inc.*, v. *Scurlock*, 347 U. S. 110; *Esso Standard Oil Co.* v. *Evans*, 345 U. S. 495, with *United States* v. *Allegheny County*, 322 U. S. 174. Similiarly, state regulation which results only in increased costs for the Government, is valid if it is not "upon" the United States. *Penn Dairies* v. *Milk Control Commission*, 318 U. S. at 270; *Stewart & Co.* v. *Sadrakula*, 309 U. S. at 105. In the instant case, however, substantial interference with the United States is involved, not only—or even necessarily—increased costs. The Arkansas Act is inapplicable to the United States, regardless of its immediate incidence, if it is "an interference with government, or an impairment of the efficiency of its agencies in any substantial way." *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 157.

bids and specifications "a copy of this Act, or such portions thereof, as are deemed necessary to convey to the invited bidder, whether he is a resident of this State, or not, the information that it will be necessary for him to have evidence of a license before his bid is considered" (Section 18, App. A, *infra*, p. 44). And both parties to the contract are equally precluded from bringing any action, "either at law or in equity to enforce any provision of any contract entered into in violation of this act" (Section 13, App. A, *infra*, p. 43).

Since the effect of the Arkansas statute is thus to impede or block the Government's power to select contractors and to schedule construction in the state, the court below erred in holding that Arkansas had the power to impose these restrictions on Government contractors.

II

THE ARKANSAS STATUTE CANNOT BE APPLIED TO A FEDERAL CONTRACTOR BECAUSE IT IS INCONSISTENT WITH FEDERAL LAW REGULATING PROCUREMENT BY THE UNITED STATES

Aside from the general constitutional immunity protecting the Federal Government's activities, the application of the Arkansas licensing statute conflicts squarely with specific federal legislation and regulations governing procurement by the United States. Congress has the power, of course, to preclude state regulation of instrumentalities and contractors utilized by the Federal Government. *Franklin National Bank* v. *New York*, 347 U. S. 373; *Carson* v. *Roane-Anderson Co.*, 342 U. S. 232; *Federal Land Bank* v. *Bis-*

marck Co., 314 U. S. 95; *Pittman* v. *Home Owners' Loan Corp.*, 308 U. S. 21; see *Penn Dairies, Inc.* v. *Milk Control Commission*, 318 U. S. 261, 269, 271–78. We submit that Congress has done so here.

A comprehensive scheme of procurement policies is found in the Armed Services Procurement Act of 1947 (Act of February 19, 1948, 62 Stat. 21, 41 U. S. C. 151 *et seq.*), App. B, *infra*, pp. 46–49, and the regulations under it (32 CFR c. I(A), V(G), VII(J) (1954)), App. B, *infra*, pp. 49–53, which have the force of law. *Standard Oil Co.* v. *Johnson*, 316 U. S. 481, 484; *Johnson* v. *Yellow Cab Co.*, 321 U. S. 383, 389–90; cf. *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110; *United States* v. *Allegheny County*, 322 U. S. 174, 182–83.

The standards with which federal officials are directed to comply, and the judgments they are expected to exercise, are laid out in substantial detail. The Act contemplates that the great majority of contracts for supplies and services will be placed through competitive bidding, but that in certain situations the public interest requires purchases to be made by negotiation. Sections 2 (c), (3), App. B, *infra*, pp. 46, 49; see H. Rep. No. 109, 80th Cong., 1st Sess., p. 3; S. Rep. No. 571, 80th Cong., 1st Sess., p. 2. The Act sets forth 16 situations in which contracts may be negotiated without advertising, including, among others, where the public exigency will not allow delay, where it is impractical to secure competition, and where it is in the interest of the national defense that a particular plant be kept available. Section 2 (c) (1)–(16), App. B, *infra*, pp. 46–48. It also declared to be the policy of Congress that a fair proportion of contracts be placed

with small business concerns. Section 2 (b), App. B, *infra*, p. 46.

Even when awards are made on the basis of competitive bidding, there is no single dispositive factor. The guiding principle is not a mechanical acceptance of the lowest bid, but rather that the award must be made "to that responsible bidder whose bid * * * will be most advantageous to the Government, price and other factors considered" (Section 3, App. B, *infra*, p. 49). Armed Services Procurement Regulations 1.307, 1.307.1, 2.406–1, App. B, *infra*, pp. 49–51, define a "responsible bidder" as one with adequate financial and technical resources and a satisfactory record of performance, integrity, judgment and skills.[15] Expanding upon the factors to be considered, Regulation 2.406–3, App. B, *infra*, p. 51, provides that, besides price, procurement officials are to take into account, *inter alia*, the judgment, skill and integrity of the bidder; his reputation and experience; prior work of a similar nature done by him; and the advantages or disadvantages to the Government that might result from making multiple awards. When contracts are negotiated, Regulation 3.101, App. B, *infra*, pp. 52–53, requires contracting officers to give due attention to a minimum of 19 factors there listed. See also Army

[15] The pertinent committee reports explain that the determination of whether

"* * * a particular bidder is a 'responsible bidder' requires sound business judgment, and involves an evaluation of the bidder's experience, facilities, technical organization, reputation, financial resources, and other factors. * * * broad discretion is accordingly reserved to the service in this respect." [H. Rep. No. 109, 80th Cong., 1st sess., pp. 18–19; S. Rep. No. 571, 80th Cong., 1st Sess., p. 16.]

Procurement Regulations 590.301, 590.357 (32 CFR 590.301, 590.357).[16]

The Act and regulations thus required the federal procurement officials concerned with the instant contract to exercise their judgment and discretion by giving due consideration to a number of stated factors. See S. Rep. No. 571, 80th Cong., 1st Sess., pp. 2–3. Congress expressed its controlling objective that "the exercise of judgment by the purchasing officer should not merely be permitted but should be encouraged." *Id.* at p. 3. And there is no question but that the contract in this suit was awarded to appellant in accordance with the governing federal law and regulations.

Evidently, in the opinion of the responsible officials, the bidding contractors licensed by Arkansas were not as well qualified to carry out the federal program as appellant, an out-of-state contractor not licensed by Arkansas. It was probably foreseeable that in constructing the uncommon aircraft fueling facilities here involved, the Government might have to look beyond previous Arkansas licensees to find the best qualified contractor. This award cannot be questioned by the unsuccessful bidders themselves, and it is not

[16] The regulations also provide that certain persons will not be awarded contracts. Those made ineligible include firms and individuals found to have violated the Walsh-Healey Act (41 U. S. C. 37), the Davis-Bacon Act (40 U. S. C. 276a–2 (a)), and the Buy-American Act (41 U. S. C. 10b); firms and individuals convicted in a court of competent jurisdiction of fraud or violation of the anti-trust laws; and firms and individuals found by clear and convincing evidence to have violated certain named contract provisions. See 32 CFR 1.600 to 1.609; 32 CFR 590.600–50 to 590.609.

reviewable by the courts. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 125–29; *Alabama Power Co.* v. *Ickes*, 302 U. S. 464; *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924 (C. A. D. C.), certiorari denied, 350 U. S. 884. Any interference by state governments would also constitute an infringement of the "principle acted upon since the Nation's founding under which the legislative and executive departments have exercised complete and final authority to enter into contracts for Government purchases." *Perkins* v. *Lukens Steel Co.*, 310 U. S. at 128.

Nevertheless, Arkansas has sought to nullify the award and restrict the United States to state-licensed contractors. It would compel the federal officials to abandon their considered judgment in choosing appellant and to select a contractor who, while licensed by Arkansas, nevertheless does not as fully satisfy the criteria determining the lowest responsible bidder. In *Penn Dairies, Inc.* v. *Milk Control Commission*, 318 U. S. 261, considering whether a state's minimum price regulation conflicted with the federal procurement statutes and regulations, this Court held that the Federal statutes were "wholly consistent" with acceptance of local price regulation since Congress had specifically excused competitive bidding when it was "impracticable to secure competition" (318 U. S. at 272–73, 277), and because numerous other provisions negated an inflexible policy of taking the lowest bid (*id.* at 273–75). The Army's regulations were found explicitly to have left the question as to the applicability

of state price legislation to the courts (*id.* at 276–78). And the Court pointedly noted that the state regulation imposed "no prohibition on the national government or its officers" (*id.* at 270).

In contrast, there is no provision of statute or regulation which can be adduced to support the subordination of federal procurement to the instant Arkansas statute. And the Arkansas statute would not only require federal officers to include the State's licensing requirements in their invitations to bid (Section 18, App. A, *infra*, p. 44), but declares unenforceable "any provision of any contract entered into in violation of this Act" (Section 13, App. A, *infra*, p. 43). The result would not be merely an adjustment in price terms and increased cost, as in *Penn Dairies*, but a nullification of the Federal Government's choice of contractor. Arkansas, in effect, warns the Federal Government that if its officials persist in determining for themselves the means of implementing the federal legislation and regulations, the State will prosecute the Government's contractors, will enjoin them from performing their contracts, and will prevent the enforcement of contractual rights arising under the Government's contract. Plainly, the national procurement policy established by Congress, and directed to be enforced by federal officials, is inconsistent with the continued existence of these burdens. The Arkansas statute must, therefore, give way.

This conclusion is buttressed by the fact that no state need or policy suffers any appreciable damage

by denying the power of Arkansas to apply its licensing statute to contracts with the Federal Government. This Court, in curtailing the immunity in the tax situation, concluded not only that the United States would not be hindered by a lesser immunity (see *supra*, pp. 10–12), but also that an extended immunity would threaten the fiscal soundness of the states. See *Esso Standard Oil Co.* v. *Evans*, 345 U. S. at 500; *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. at 490 (Frankfurter, J., concurring). No comparable result could follow if federal contractors are excluded from coverage of the state licensing statute. Indeed, since the Government's construction projects are often—as in the instant case—of a unique nature and solely for federal use, there is no reason to expect that the normal application of the licensing statute would be at all affected.

Furthermore, the case is unlike *Stewart & Co.*, v. *Sadrakula*, 309 U. S. 94, and *Penn Dairies, Inc.* v. *Milk Control Commisison*, 318 U. S. 261, in which the local regulation safeguarded the health and safety of New York and Pennsylvania citizens while merely increasing the cost of federal operations. See 309 U. S. at 104; 318 U. S. at 279–81. A superficial argument may be made that the Arkansas licensing statute is designed to protect the public health and safety in that the licensing board is required to consider, among the qualifications of any applicant for a license, his experience, ability, character, manner of performance of previous contracts, financial condition and equipment (Section 9, App. A, *infra*, pp. 40–41). But

this provision is paralleled by the federal procurement law; it cannot be seriously suggested that the United States is incompetent—or demonstrably less competent than Arkansas' part-time Licensing Board—to pass upon the qualifications of its independent contractors, or that it fails to do so. See *supra*, pp. 26–28. Moreover, the standard form provisions of government contracts embody statutory requirements which are designed to safeguard the interests of all citizens, including those of Arkansas. See U. S. Standard Form Nos. 23–Rev., 25–A, 41 U. S. C. App. 54.13, 54.16. And compare, as to fraud and misconduct, Section 11 of the Arkansas Act with 32 CFR 1.604–1, 590.604. There is no reasonable ground for permitting Arkansas to require "qualifications in addition to those that the Government has pronounced sufficient." *Johnson* v. *Maryland*, 254 U. S. 51, 57. This is particularly so where the Arkansas statute is not merely a local rule which "might affect incidentally" the contractor's operations, "as, for instance, a statute or ordinance regulating the mode of turning at the corners of streets" (*id.* at 56), but a prime piece of legislation which directly hampers and conflicts with the federal program.

It is apparent, in short, that striking down the state statute as applied to government contractors would not seriously impair the police power of the State or prevent its objectives from being realized. It would achieve only the salutary and constitutionally required end of permitting the realization of the Federal Government's objectives and programs.

CONCLUSION

For these reasons, it is respectfully submitted that the judgment below should be reversed.

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OCTOBER 1956.

APPENDIX A

Act 124 of Arkansas Acts 1939, as amended, Arkansas Statutes 1947, Sections 71-701 to 71-721, provides:

SECTION 1 [as amended by Act 153, Arkansas Acts 1951, Sec. 1]. For the purposes of this act a 'contractor' is defined to be any person, firm, partnership, co-partnership, association, corporation, or other organization, or any combination thereof, who for a fixed price, commission, fee or wage attempts to or submits a bid or bids to construct, or contracts or undertakes to construct, or assumes charge, in a supervisory capacity or otherwise, of the construction, erection, alteration or repair, or has or have constructed, erected, altered, or repaired, under his, their or its direction, any building, highway, sewer, grading or any other improvement or structure, when the cost of the work to be done, or done, in the State of Arkansas by the contractor, including but not limited to labor and materials, is twenty thousand dollars ($20,000.00) or more.

Architects and engineers, whose only financial interest in a project shall be the architectural or engineering fees for preparing plans, specifications, surveys and such supervision as is customarily furnished by architects and engineers, are specifically excluded from this act.

Wherever the term "general contractor" shall appear in this act it shall mean "contractor", as hereinbefore defined, and wherever the term "general contracting" shall appear in this act it shall mean "contracting."

SECTION 2. That there is hereby created a State Licensing Board for General Contractors, [changed to "Contractors Licensing Board"—Act 153, Arkansas Acts 1951, Sec.

5[1]] consisting of five (5) members, who shall be appointed by the Governor. Each member shall be at least thirty-five (35) years of age, a resident of the State of Arkansas, and a general contractor of not less than ten (10) years' experience in responsible charge of construction projects of magnitude consistent with the duties of his office. At least one member of such Board shall have had as a larger part of his business the construction of highways. At least one member of such Board shall have had as a larger part of his business the construction of sewers and waterworks. At least one member of such Board shall have had as larger part of his business the construction of buildings. The members of the Board shall be appointed for one, two, three, four, and five years, respectively, their terms expiring on the 31st day of December of said year. Thereafter in each year the Governor shall appoint to fill the vacancy caused by expiration, for a term of five years. Each member shall hold over, after the expiration of his term, until his successor shall be duly appointed and qualified. If a vacancy shall occur in the Board for any cause, same shall be filled by appointment by the Governor, and the Governor may remove any member of the Board at any time for misconduct, incompetency or neglect of duty.

SECTION 3. That each member of the Board shall receive a certificate of appointment from the Governor, and, before entering upon the

[1] Section 5 of Act 153, Arkansas Acts 1951 (Arkansas Stats. 1947, Sec. 71-702.1) provides:

"The State Licensing Board for General Contractors shall be known hereafter as the 'Contractors Licensing Board,' and wherever the name 'State Licensing Board for General Contractors,' or the word 'Board,' shall appear in Act 124, approved February 24, 1939, or acts amendatory thereof, such name and word shall mean 'Contractors Licensing Board." The Board shall adopt a seal for its use which shall have on it the words 'State of Arkansas Contractors Licensing Board.' "

discharge of the duties of his office, shall file with the Secretary of State the constitutional oath of office. Each member of the Board first created shall receive a license to operate as a general contractor under this Act from the Governor, and thereafter no one shall be eligible for appointment on the Board who does not at the time hold an unexpired license to operate as a general contractor in Arkansas under this Act, and who has not been a bona fide resident of Arkansas for the previous five (5) years, and at the time of appointment does not maintain his general office in Arkansas. The Board, or any Committee thereof, shall be entitled to the services of the Attorney General, or the Legal Department of the State, in connection with the operation of the affairs of the Board. Such additional legal counsel, however, may be employed by the Board from time to time as it may deem necessary.

SECTION 4. That the Board shall, within (30) days after its appointment by the Governor, meet in the City of Little Rock at a time and place to be designated by the Governor, and at said meeting shall elect a Chairman, Vice-Chairman, and Secretary each to serve in his respective capacity for one year, and thereafter said officers shall be elected by said Board annually. Said Board shall have power to make such by-laws, rules, and regulations for its operation as it shall deem best; provided the same are not in conflict with the laws of the State of Arkansas. The Board shall adopt a seal for its own use. The seal shall have on it the words, "Arkansas State Licensing Board for General Contractors, Seal," [changed to "State of Arkansas Contractors Licensing Board"—Act 153, Arkansas Act of 1951, Sec. 5, n. 1, p. 35, *supra*] and the Secretary shall have charge, care and custody thereof. That within sixty (60) days after the Board has been organized, it shall meet for the purpose of receiv-

ing applications for certificates to engage in the business of general contracting, and for the transaction of such other business as may come before it, and thereafter shall have two (2) regular meetings in each year; one in the month of February, and one in the month of August, for the purpose of transacting such business as may properly come before it, on call of the Chairman of the Board. Special or adjourned meetings may be held at such time as the Board may provide by the by-laws which it shall adopt, or at such time as the Board may, by reasonable resolution, provide. Due notice of each meeting and the time and place thereof shall be given to each member in such manner as the by-laws shall provide. Three (3) members of the Board shall constitute a quorum. All meetings of the Board shall be held in Little Rock, Arkansas.

SECTION 5. The Secretary shall keep a record of the proceedings of said Board, and shall receive and turn over to the Treasurer of the State of Arkansas all moneys derived from the operation of this Act, and shall draw and certify all vouchers for expenses incurred by the Board. The said vouchers shall be countersigned by the Chairman of the Board, and drawn to the Auditor of the State of Arkansas who shall issue warrants to the Treasurer of the State of Arkansas for the payment of such certified expenses. All moneys received by the State Treasurer shall be kept by him as a separate fund styled "General Contractor's Fund." The Secretary shall give bond in such sum as the State Treasurer shall determine with such surety company as shall be approved by the State Treasurer, said bond to be conditioned upon the faithful performance of the duties of his office, and upon the faithful accounting of all moneys and other properties which shall come into his hands.

SECTION 6 [as amended by Act 153, Arkansas Acts 1951, Sec. 2]. Each Member of the Board shall receive fifteen dollars per day while the Board is in session, and reimbursement for necessary traveling expense, board and lodging. The Board shall have the power to employ an assistant secretary at not more than two hundred dollars per month; an attorney-investigator at not more than three hundred dollars per month; two senior clerks at not more than one hundred seventy-five dollars per month each; and, two junior clerks at not more than one hundred thirty-five dollars per month each [changed by Act 245, Arkansas Acts 1953 [2]]. All expenses incurred by the Board for the administration of this Act are hereby authorized to be paid by the Board; provided, however, no funds may be expended for the purpose of purchasing or constructing a building or any portion of a building.

SECTION 7 [as amended by Act 217, Arkansas Acts 1945, Sec. 1]. That the Secretary shall keep a register of all applications for license showing for each the date of application, name, qualification, place of business, place of residence, and whether the license was granted or refused, as well as a complete transcript of the proceedings, including evidence submitted by applicants, licensees, the Board, or otherwise, at any hearing. The books and register of this Board, including transcripts of proceedings, shall be prima facie evidence of all matters recorded therein, and a certified

[2] Act 245, Arkansas Acts 1953, provides:

"SECTION 1 [Arkansas Statutes 1947, Sec. 71-721]. The Contractors Licensing Board is hereby authorized to employ an Assistant Secretary at a salary of not more than $300.00 per month; one Senior Clerk at a salary of not more than $275.00 per month; and two Junior Clerks at a salary of not more than $200.00 per month each.

"SECTION 2. All laws and parts of laws in conflict herewith are hereby repealed."

copy of such books or register, including transcript of proceedings, under the seal of the Board attested by its Secretary, shall be received in evidence in all courts of the State in lieu of the original. A roster showing the names and places of business and of residence of all licensed general contractors shall be prepared by the Secretary of the Board as soon as convenient, and not more than ninety (90) days after the Board shall have organized, and during the month of August of each succeeding year. Such roster shall be ordered printed by the Board and paid for out of the funds herein appropriated for the operation of this Act. On or before the first day of August of each year, the Board shall submit to the Governor a report of its transactions for the preceding year, and shall file with the Secretary of State a copy of such report, together with a complete statement of receipts and expenditures of the ~~Board, attested by its Secretary, shall be re-~~ Board attested by the affidavit of the Chairman and Secretary, and copy of said roster of licensed general contractors.

SECTION 8 [as amended by Act 217, Arkansas Acts 1945, Sec. 2, and Act 153, Arkansas Acts 1951, Sec. 3]. That any one, other than members selected by the Governor as hereinbefore provided, hereafter desiring to be licensed as a general contractor in this State shall make and file with the Board thirty (30) days prior to any regular or special meeting thereof, a written application on such form as may then be by the Board prescribed, for examination by the Board, said application to be accompanied by a certified check in the sum of Fifty Dollars ($50.00) payable to the Contractors Licensing Board. If said application complies with the Board's rules and regulations, then the applicant shall be entitled to an examination to determine his, their, or its qualifications. If the result of the examination of any applicant shall be satis-

factory to the Board, then the Board shall issue to the applicant a certificate to engage in general contracting in the State of Arkansas. Any person thus receiving a certificate of license from the Board shall forthwith have it recorded in the office of the Secretary of State, and the date of recording shall be evidenced thereon. Until the license is recorded, the holder thereof shall not exercise any of the rights or privileges therein conferred, and in case such license is not recorded within sixty (60) days from the date of its issuance it shall become invalid. The Secretary of State shall be paid a fee of $1.00 for recording said certificate, and shall keep in a book to be provided by him for that purpose a complete list of certificates of license recorded by him, together with the date of each, and the date of recording. Any applicant failing to pass the examination prescribed by the Board shall be entitled to the refund of his, their or its fee accompanying the application. Any one failing to pass such examination may be re-examined at any regular meeting of the Board upon payment of regular fee.

All certificate of license to engage in the business of contracting in the State of Arkansas shall expire the last day of June following the issuance or renewal thereof, and shall become invalid on that day unless renewed. A fee of $50.00, payable at the time of filing the application, shall be assessed against each applicant and thereafter an annual renewal license fee to be determined by the Board but not to exceed $50.00 shall be paid by each licensee to defray the costs and expenses of the administration of this Act.

SECTION 9. That the Board, in determining the qualifications of any applicant for original license, or any renewal license, shall, among other things, consider the following: (a) experience, (b) ability, (c) character, (d) the

manner of performance of previous contracts, (e) financial condition, (f) equipment, (g) any other fact tending to show ability and willingness to conserve the public health and safety, and (h) default in complying with the provisions of this Act, or any other law of the State. A record shall be made and preserved by the Board of each examination of applicant or licensee, and the findings of the Board thereon, and a certified copy of the record shall be furnished to any applicant or licensee desiring to appeal from the findings of said Board, as hereinafter provided, upon payment of the costs of transcribing such record.

SECTION 10. That the Board shall have power to limit the license to that character of work for which the applicant is qualified.

SECTION 11. That the Board shall have the power to revoke the certificate of license of any general contractor licensed hereunder who is found guilty of any fraud or deceit in obtaining a license or for gross negligence, incompetence or misconduct in the conduct of his, their, or its business. Any person may prefer charges of such fraud, deceit, negligence or misconduct against any general contractor licensed hereunder. Such charge shall be in writing and sworn to by the complainant and mailed to the Board. Such charges, unless dismissed without hearing by the Board as unfounded or trivial, shall be heard and determined by the Board within thirty days after the date on which they were made. A time and place for such hearing shall be fixed by the Board and held in the City of Little Rock, County of Pulaski, and State of Arkansas. A copy of the charges, together with the notice of the time and place of hearing, shall be considered as legally served by the Board when sent to the last known address of the accused by registered mail, at least ten days before the fixed date for the hearing, and in the event that such service cannot be

effected ten days before such hearing, then the date of hearing and determination shall be postponed as may be necessary to permit the carrying out of this condition. At said hearing the accused shall have the right to appear personally and by counsel, and to cross-examine witnesses against him, them or it, and to submit evidence in his, their or its behalf and defense. If after said hearing the Board finds the facts as alleged and of such character as to disqualify the licensee, then the Board shall revoke the license of the accused, but in such event no refund shall be made of the license fee. The Board may, within its discretion and upon proper application or hearing, reissue a license to any person, firm or corporation whose license has been revoked. The Board shall immediately notify the Secretary of State of its findings in the case of a revocation of a license, or of a reissuance of a revoked license. A certificate of license to replace any certificate lost, destroyed or mutilated may be issued subject to the rules and regulations of the Board.

SECTION 12. That the issuance of a certificate of license by this Board shall be evidence that the person, firm or corporation named therein is entitled to all of the rights and privileges of a licensed general contractor while the said license remains unrevoked or unexpired.

SECTION 13 [as amended by Act 217, Arkansas Acts 1945, Sec. 1 and Act 153, Arkansas Acts 1951, Sec. 4]. Any contractor who for a fixed price, commission, fee or wage, attempts to or submits a bid or bids to construct, or contracts to construct, or undertakes to construct, or assumes charge, in a supervisory capacity or otherwise, of the construction, erection, alteration or repair, of any building, highway, sewer, grading, or any other improvement or structure, when the cost of the work to be done by the contractor, including but not limited to labor and materials, is $20,000.00 or more, with-

out first having procured a license to engage in the business of contracting in this State, or who shall present or file the license certificate of another, or who shall give false or forged evidence of any kind to the Board, or any member thereof, in obtaining a certificate of license, or who shall impersonate another, or who shall use an expired or revoked certificate of license, shall be deemed guilty of a misdemeanor, and shall be liable to a fine of not less than $100.00 nor more than $200.00 for each offense, each day to constitute a separate offense. No action may be brought either at law or in equity to enforce any provision of any contract entered into in violation of this Act. The doing of any act or thing herein prohibited by any applicant or licensee shall in the discretion of the Board constitute sufficient grounds to refuse a license to an applicant or to revoke the license of a licensee.

SECTION 14. That in all prosecution for violations of the provisions of this Act for engaging in the business of general contracting without a certificate of authority, it shall be sufficient to allege in the indictment, affidavit or complaint that "A. unlawfully engaged in business as a general contractor, without authority from the State Licensing Board for General Contractors so to do."

SECTION 15. That the following shall be exempted from the provisions of this Act: The practice of general contracting as defined in Section 1 of this Act by an authorized representative or representatives of the United States Government, State of Arkansas, incorporated town, city or county, or other political subdivision in this State.

SECTION 16. That a corporation or partnership may engage in the business of general contracting; provided, at least one of the principals of such corporation or partnership is in re-

sponsible charge of such business and is licensed as herein required of general contractors.

SECTION 17. That when any contractor not being licensed by this Board in accordance with the provisions of this Act, shall engage, or attempt to engage, in the business of general contracting as herein defined, the Board shall have the right to go into the proper court in the jurisdiction in which the work is being performed, and upon affidavit secure a writ of injunction, without bond, restraining and prohibiting the said contractor from performance of the work then being done, or about to commence.

SECTION 18. That all architects and engineers preparing plans and specifications for work to be contracted in the State of Arkansas shall include in their invitation to bidders and in their specifications a copy of this Act, or such portions thereof, as are deemed necessary to convey to the invited bidder, whether he is a resident of this State, or not, the information that it will be necessary for him to have evidence of a license before his bid is considered.

SECTION 19. That any party aggrieved by any decision of the State Licensing Board for General Contractors shall have the right to seek review thereof by filing a petition within thirty (30) days from the finding made by said Board before any division of the Circuit Court of Pulaski County, Arkansas, in which said aggrieved party shall set out in what respect the adverse action of the Board complained of is erroneous and prejudicial, and shall request the court to review the record of the findings of said Board. Upon trial duly had, the record of the examination and hearing by the Board shall be reviewed by the Circuit Court, and at the conclusion thereof the court shall either uphold the action of the Board or shall direct the granting of the application for license denied, or the reinstatement of the license revoked, as the case may be from which an appeal may

be taken either by the applicant or by the Board to the Supreme Court as in other cases.

SECTION 20. That if any Section, sentence or provision of this Act shall be held unconstitutional, such holding shall not affect the remainder of the Act not in itself unconstitutional.

SECTION 21. That all laws or parts of laws in conflict herewith be, and the same are hereby, repealed.

SECTION 22. It is hereby determined and declared to be a fact that the practice of general contracting in the State of Arkansas is in need of regulation; that due to unethical practices, contractors within the State are being unduly penalized and are suffering irreparable injury, and this Act, being necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, and this Act shall take effect and be in force from and after its passage.

APPENDIX B

1. The pertinent provisions of the Armed Forces Procurement Act of 1947, 62 Stat. 21, 41 U. S. C. 151, *et seq.* are as follows:

SEC. 2. * * *

(b) It is the declared policy of the Congress that a fair proportion of the total purchases and contracts for supplies and services for the Government shall be placed with small business concerns. Whenever it is proposed to make a contract or purchase in excess of $10,000 by negotiation and without advertising, pursuant to the authority of paragraph (7) or (8) of section 2 (c) of this Act, suitable advance publicity, as determined by the agency head with due regard to the type of supplies involved and other relevant considerations, shall be given for a period of at least fifteen days, wherever practicable, as determined by the agency head.

(c) All purchases and contracts for supplies and services shall be made by advertising, as provided in section 3, except that such purchases and contracts may be negotiated by the agency head without advertising if—

(1) determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress;

(2) the public exigency will not admit of the delay incident to advertising;

(3) the aggregate amount involved does not exceed $1,000;

(4) for personal or professional services;

(5) for any service to be rendered by any university, college, or other educational institution;

(6) the supplies or services are to be procured and used outside the limits of the United States and its possessions;

(7) for medicines or medical supplies;

(8) for supplies purchased for authorized resale;

(9) for perishable subsistence supplies;

(10) for supplies or services for which it is impracticable to secure competition;

(11) the agency head determines that the purchase or contract is for experimental, developmental, or research work, or for the manufacture or furnishing of supplies for experimentation, development, research, or test: *Provided,* That beginning six months after the effective date of this Act and at the end of each six-month period thereafter, there shall be furnished to the Congress a report setting forth the name of each contractor with whom a contract has been entered into pursuant to this subsection (11) since the date of the last such report, the amount of the contract, and, with due consideration given to the national security, a description of the work required to be performed thereunder;

(12) for supplies or services as to which the agency head determines that the character, ingredients, or components thereof are such that the purchase or contract should not be publicly disclosed;

(13) for equipment which the agency head determines to be technical equipment, and as to which he determines that the procurement thereof without advertising is necessary in order to assure standardization of equipment and interchangeability of parts and that such standardization and interchangeability is necessary in the public interest;

(14) for supplies of a technical or specialized nature requiring a substantial initial investment or an extended period of preparation for manufacture, as determined by the agency head,

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when he determines that advertising and competitive bidding may require duplication of investment or preparation already made, or will unduly delay procurement of such supplies;

(15) for supplies or services as to which the agency head determines that the bid prices after advertising therefor are not reasonable or have not been independently arrived at in open competition: *Provided,* That no negotiated purchase or contract may be entered into under this paragraph after the rejection of all bids received unless (A) notification of the intention to negotiate and reasonable opportunity to negotiate shall have been given by the agency head to each responsible bidder, (B) the negotiated price is lower than the lowest rejected bid price of a responsible bidder, as determined by the agency head, and (C) such negotiated price is the lowest negotiated price offered by any responsible supplier;

(16) the agency head determines that it is in the interest of the national defense that any plant, mine, or facility or any producer, manufacturer, or other supplier be made or kept available for furnishing supplies or services in the event of national emergency, or that the interest either of industrial mobilization in case of such an emergency, or of the national defense in maintaining active engineering, research and development, are otherwise subserved: *Provided,* That beginning six months after the effective date of this Act and at the end of each six-month period thereafter, there shall be furnished to the Congress a report setting forth the name of each contractor with whom a contract has been entered into pursuant to this subsection (16) since the date of the last such report, the amount of the contract, and, with due consideration given to the national security, a description of the work required to be performed thereunder; or

(17) otherwise authorized by law.

* * * * *

SEC. 3. Whenever advertising is required—

(a) The advertisement for bids shall be a sufficient time previous to the purchase or contract, and specifications and invitations for bids shall permit such full and free competition as is consistent with the procurement of types of supplies and services necessary to meet the requirements of the agency concerned.

(b) All bids shall be publicly opened at the time and place stated in the advertisement. Award shall be made with reasonable promptness by written notice to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered: *Provided,* That all bids may be rejected when the agency head determines that it is in the public interest so to do.

2. The pertinent provisions of the Armed Services Procurement Regulations, 32 C. F. R. 1.100 *et seq* (1954), are as follows:

§ 1.307 *Responsible prospective contractor.* Prior to the award of any contract for supplies or services the Contracting Officer shall determine that the prospective contractor is responsible. A responsible contractor is one which meets all of the requirements set forth in this section.

(a) Is a manufacturer, construction contractor, or regular dealer, if the contract or order calls for supplies (see § 1.201–9);

(b) Has adequate financial resources, or ability to secure such resources;

(c) Has the necessary experience, organization, and technical qualifications, and has or can acquire the necessary facilities (including probable subcontractor arrangements) to perform the proposed contract;

(d) Is able to comply with the required delivery or performance schedule (taking into

consideration all existing business commitments);

(e) Has a satisfactory record of performance, integrity, judgment, and skills; and

(f) Is otherwise qualified and eligible to receive an award under applicable laws and regulations.

§ 1.307–1 *Pre-award survey.* (a) If the Contracting Officer finds that readily available information is not sufficient to enable him to determine that the prospective contractor meets all of the applicable requirements of § 1.307 he shall request a pre-award survey. A pre-award survey is a qualification check to determine that the prospective contractor is responsible. Preferably the survey should be made by technical and financial specialists in the appropriate fields, and may include an "on the spot" check of the facilities of the prospective contractor. Generally, a pre-award survey will not be necessary in determining that a prospective contractor is responsible when one or more of the following factors are applicable:

(1) The supplies required are off-the-shelf items to be obtained from a regular dealer or manufacturer.

(2) The prospective supplier has proved his reliability and capability by satisfactory performance of an existing or recent similar contract or contracts.

(3) The new purchase is an extension of a production or service currently being performed satisfactorily.

(4) The purchase is to be made from a Federal Supply Schedule.

(b) Normally, where the dollar amount of a procurement is not sufficient to justify the cost of a pre-award survey, Contracting Officers will not request such a survey. However, where a Contracting Officer has reason to believe that a prospective contractor may not be responsible, he may request a pre-award sur-

vey irrespective of the dollar amount of the procurement.

§ 1.307–2 *Experience data.* Departments are authorized to maintain such records and experience data as may be deemed desirable for the guidance of Contracting Officers in the placing of new procurements. In making use of such materials, Contracting Officers shall assure themselves that the information contained therein is current. The departments are encouraged to exchange and confer concerning such records and experience data to the extent that the information contained therein will be mutually useful.

* * * * *

§ 2.406–1 *Responsible bidder.* A "responsible bidder" is a bidder who satisfies the requirements of § 1.307 of this subchapter.

* * * * *

§ 2.406–3 *Other factors to be considered.* Among other factors besides price that may be considered in making an award are the following:

(a) Judgment, skill, and integrity of a bidder;

(b) Reputation and experience of a bidder, and prior work of a similar nature done by him;

(c) Foreseeable costs or delays to the Government resulting from differences in inspection, shipping, location of supplies, etc.;

(d) Changes made or requested in any of the provisions of the solicitation, to the extent that any such change does not constitute ground for rejection of the bid under the provisions of § 2.403;

(e) Restrictions or conditions imposed in the bid; and

(f) Advantages or disadvantages to the Government that might result from making multiple awards.

* * * * *

§ 3.101 *Negotiations as distinguished from formal advertising.* As used throughout this subchapter, negotiation means that method of procurement under which the procedures for procurement by formal advertising, as set forth in this part, are not required. Whenever supplies or services are to be procured by negotiation, price quotations, supported by statements and analyses of estimated costs or other evidence of reasonable prices and other vital matters deemed necessary by the Contracting Officer, shall be solicited from all such qualified sources of supplies or services as are deemed necessary by the Contracting Officer to assure full and free competition consistent with the procurement of the required supplies or services, in accordance with the basic policies set forth in Subpart C of Part 1 of this subchapter, to the end that the procurement will be made to the best advantage of the Government, price and other factors considered. Negotiation shall thereupon be conducted, by Contracting Officers and their negotiators, with due attention being given to the following and any other appropriate factors:

(a) Comparison of prices quoted, and consideration of other prices for the same or similar supplies or services, with due regard to production costs, including extra-pay shift, multishift and overtime costs, and any other factor relating to price, such as profits, cost of transportation, and cash discounts;

(b) Comparison of the business reputations, capabilities, and responsibilities of the respective persons or firms who submit quotations;

(c) Consideration of the quality of the supplies or services offered, or of the same or similar supplies or services previously furnished, with due regard to the satisfaction of technical requirements;

(d) Consideration of delivery requirements (see § 1.306 of this subchapter);

(e) Discriminating use of price and cost analyses;

(f) Investigation of price aspects of any important subcontract;

(g) Individual bargaining, by mail or by conference;

(h) Consideration of cost sharing;

(i) Effective utilization in general of the most desirable type of contract, and in particular of contract provisions relating to price redetermination;

(j) Consideration of the size of the business concern;

(k) Consideration as to whether the prospective supplier is a planned producer under the industrial mobilization program;

(l) Consideration as to whether the prospective supplier requires expansion or conversion of plant facilities;

(m) Consideration as to whether the prospective supplier is located in a surplus or scarce labor area;

(n) Consideration as to whether the prospective supplier will have an adequate supply of qualified labor;

(o) Consideration of the extent of subcontracting;

(p) Consideration of the existing and potential workload of the prospective supplier;

(q) Consideration of broadening the industrial base by the development of additional suppliers;

(r) Consideration of whether the contractor requires Government furnished property, machine tools, or facilities; or Government-operated test facilities; and

(s) Consideration of contract performance in facilities located in dispersed sites.

* * * * *

APPENDIX C

1. RULES AND REGULATIONS OF THE CONTRACTORS LICENSING BOARD OF ARKANSAS, PROMULGATED PURSUANT TO ACT 124 OF 1939, AS AMENDED

1

Regular meetings of the Board shall be held in the office of the Board, Meers Building, Little Rock, Arkansas, at 10 a. m. on the first Monday of February and August. Special meetings of the Board may be held upon call of the Chairman or a majority of the Board. Each member of the Board shall be given notice of any special meeting at least 48 hours prior thereto.

2

Applications for licenses shall be filed on forms furnished by the Board and shall be supported by such data as the Board may determine is necessary to enable it to pass upon an applicant's qualifications.

3

Every financial statement required of an applicant shall bear the certificate of a certified public accountant.

4

An application for a license shall not be considered until the required fee shall have been paid.

5

A license issued upon the condition that additional data be furnished to the Board by the licensee on or

before a date set by the Board shall become null and void on such date without further action by the Board, in the event the required data is not filed with the Board.

These Rules and Regulations are published and filed as required by Act 183 of the Acts of Arkansas for 1953.

2. APPLICATION FOR LICENSE TO PRACTICE CONTRACTING IN ARKANSAS

Date_____, 19____

State of Arkansas,
Contractors Licensing Board
Little Rock, Arkansas.

Gentlemen:

I/We hereby apply for examination for registration and a certificate to practice the profession of Contracting in the State of Arkansas. I/We inclose herewith certified check for $50.00 (renewal—$25.00), payable to, Contractors Licensing Board, to cover fee.

1. Nationality_____ Color_____
2. If firm or corporation, give names of partners, or titles of officers_____
3. Have you been employed by any person or corporation for the discharge of duties pertaining to the practice of the profession of Contracting? If so, give the names and address of not more than three such persons or corporations, the time by each employed and the nature of such employment_____
4. State what branch of Contracting you desire to qualify under
5. Upon receipt of this application the Board will advise you of further requirements.
7. References:

One Architect or Engineer_____ (Name) (Address)

*Bank_____ (Name) (Street) (City) (State)

*One Material Supply Dealer_____ (Name) (Street) (City) (State)

One General Contractor_____ (Preferably one licensed under the law) (Name) (Street) (City) (State)

*PLEASE GIVE STREET ADDRESS ON REFERENCES

_____ (Name of Applicant)

By_____

_____ (Business Address)

_____ (Residence or Principal Office)

[Affidavits of truthfulness are on the reverse side; they are omitted in printing.]

2. APPLICATION FOR LICENSE TO PRACTICE CONTRACTING IN ARKANSAS

Date_____, 19____

State of Arkansas,
Contractors Licensing Board
Little Rock, Arkansas.

Gentlemen:

I/We hereby apply for examination for registration and a certificate to practice the profession of Contracting in the State of Arkansas. I/We inclose herewith certified check for $50.00 (renewal—$25.00), payable to, Contractors Licensing Board, to cover fee.

1. Nationality_____ Color_____
2. If firm or corporation, give names of partners, or titles of officers_____
3. Have you been employed by any person or corporation for the discharge of duties pertaining to the practice of the profession of Contracting? If so, give the names and address of not more than three such persons or corporations, the time by each employed and the nature of such employment_____
4. State what branch of Contracting you desire to qualify under
5. Upon receipt of this application the Board will advise you of further requirements.
7. References:

One Architect or Engineer_____
(Name) (Address)

•Bank_____
(Name) (Street) (City) (State)

•One Material Supply Dealer_____

2. If firm or corporation, give names of partners, or titles of officers_____
3. Have you been employed by any person or corporation for the discharge of duties pertaining to the practice of the profession of Contracting? If so, give the names and address of not more than three such persons or corporations, the time by each employed and the nature of such employment_____
4. State what branch of Contracting you desire to qualify under
5. Upon receipt of this application the Board will advise you of further requirements.
7. References:

One Architect or Engineer_____
(Name) (Address)

•Bank_____
(Name) (Street) (City) (State)

•One Material Supply Dealer_____
(Name) (Street) (City) (State)

One General Contractor_____
(Preferably one licensed under the law) (Name) (Street) (City) (State)

•PLEASE GIVE STREET ADDRESS ON REFERENCES

_____
(Name of Applicant)

By_____

(Business Address)

(Residence of Principal Officer)

4. CONTRACTOR'S STATEMENT OF EXPERIENCE AND FINANCIAL CONDITION SUBMITTED WITH APPLICATION FOR LICENSE

SUBMITTED BY _____ ☐ A Corporation ☐ A Co-partnership ☐ An Individual

PRINCIPAL OFFICE _____

The signatory of this questionnaire guarantees the truth and accuracy of all statements and of all answers to interrogatories hereinafter made

1. How many years has your organization been in business as a contractor under your present business name? _____

2. How many years experience in _____ construction work has your organization had:

(a) As a General Contractor—Building? _____ Heavy? _____ (b) As a sub-contractor _____

3. Show the projects your organization has completed, in the following tabulation:

YEAR	CLASS OF WORK	CONTRACT AMOUNT	LOCATION OF WORK AND FOR WHOM PERFORMED

3. AFFIDAVIT SUBMITTED WITH APPLICATION FOR LICENSE

STATE OF _____
Parish
County } ss:
of _____

_____, being duly sworn, deposes and says: That the applicant is not a party to any contract in the State of Arkansas for work in the amount of $20,000.00 or more, does not have outstanding a bid for work in the State of Arkansas in the amount of $20,000.00 or more, and will not bid on any work in the State of Arkansas in the amount of $20,000.00 or more until such time as this application is approved and a Contractor's License has been issued to the applicant.

_____

(To be signed by applicant if an individual, a partner if a partnership, or a responsible officer if a corporation.)

SWORN TO BEFORE ME THIS ____ DAY OF _____ 195__.

_____
Notary Public

My commission expires: _____

9. For what corporation or individuals have you performed work, and to whom do you refer?

9. For what cities have you performed work, and to whom do you refer?

10. For what parishes or counties have you performed work, and to whom do you refer?

11. For what State Bureaus or Departments have you performed work, and to whom do you refer?

12. Have you ever performed work for the U. S. Government? If so, when, and to whom do you refer?

11. For what State Bureaus or Departments have you performed work, and to whom do you refer?

12. Have you ever performed work for the U. S. Government? If so, when, and to whom do you refer?

13. Name the persons with whom you have been associated in business as partners or business associates in each of the last five years:

14. What is the construction experience of the principal individuals of your present organization?

INDIVIDUAL'S NAME	PRESENT POSITION or OFFICE IN YOUR ORGANIZATION	YEARS OF CONSTRUCTION EXPERIENCE	MAGNITUDE AND TYPE OF WORK	IN WHAT CAPACITY

15. Have you filed performance record reports with the Bureau of Contract Information, Inc., Washington, D. C.?

CONTRACTOR'S FINANCIAL STATEMENT

NAME YOUR BANKER_____

Condition at close of business_____ 19____

	Dollars	Cts.
ASSETS		
1. Cash: (a) On hand $_____ (b) In bank $_____ (c) Elsewhere $_____		
2. Notes Receivable: (a) Due within 90 days		
(b) Due after 90 days		
(c) Past due		
3. Accounts receivable from completed contracts, exclusive of claims not approved for payment		
4. Sums earned on incomplete contracts as shown by Engineer's or Architect's estimate		
(a) Amount receivable after deducting amounts retained $_____		
(b) Amounts retained to date, due upon completion of contracts $_____		
5. Accounts receivable from sources other than construction contracts		
6. Deposits for bids or other guarantees: (a) Recoverable within 90 days		
(b) Recoverable after 90 days		
7. Interest accrued on loans, securities, etc.		
8. Stocks and Bonds: (a) Listed—book value		
(b) Unlisted—book value		
9. Materials in stock not included in Item 4: (a) For incomplete contracts (inventory value)		
(b) Other materials (inventory value)		
Total Current Assets		
FIXED ASSETS		
10. Real Estate: (a) Used for business purposes		
(b) Not used for business purposes		
11. Construction Plant and Equipment, book value		
12. Furniture and Fixtures, book value		
13. Other Assets		
Total Assets		

7. Interest accrued on loans, securities, etc.		
8. Stocks and Bonds: (a) Listed—book value		
(b) Unlisted—book value		
9. Materials in stock not included in Item 4: (a) For incomplete contracts (inventory value)		
(b) Other materials (inventory value)		
Total Current Assets		
FIXED ASSETS		
10. Real Estate: (a) Used for business purposes		
(b) Not used for business purposes		
11. Construction Plant and Equipment, book value		
12. Furniture and Fixtures, book value		
13. Other Assets		
Total Assets		
LIABILITIES		
1. Notes Payable: (a) To banks regular		
(b) To banks for certified checks		
(c) To others exclusive of equipment obligations		
2. Owing to Sub-Contractors, account of retained percentage and current estimates		
3. Accounts Payable: (a) Not past due		
(b) Past due		
Total Current Liabilities		
4. Encumbrances on equipment		
5. Real estate encumbrances		
6. Other liabilities		
7. Reserves		
8. Capital stock paid up: (a) Common		
(b) Common		
(c) Preferred		
(d) Preferred		
9. Surplus (net worth) Earned $_____ Unearned $_____		
Total Liabilities		
CONTINGENT LIABILITIES		
1. Liability on notes receivable, discounted or sold		
2. Liability on accounts receivable, pledged, assigned or sold		
3. Liability as bondsman		
4. Liability as guarantor on contracts or on accounts of others		
5. Other contingent liabilities		
Total Contingent Liabilities		

DETAILS RELATIVE TO ASSETS

1* Cash: (a) On hand $_____
(b) Deposited in banks named below $_____
(c) Elsewhere—(state where) $_____

NAME OF BANK	LOCATION	DEPOSIT IN NAME OF	AMOUNT

2* Notes receivable: (a) Due within 90 days $_____
(b) Due after 90 days $_____
(c) Past due $_____

RECEIVABLE FROM: NAME AND ADDRESS	FOR WHAT	Date of Maturity	HOW SECURED	AMOUNT

Have any of the above been discounted or sold?_____ If so, state amount, to whom, and reason_____

3* Accounts receivable from completed contracts exclusive of claims not approved for payment . . . . . $_____

Have any of the above been discounted or sold?_____ If so, state amount, to whom, and reason_____

3* Accounts receivable from completed contracts exclusive of claims not approved for payment . . . . . $_____

NAME AND ADDRESS OF OWNER	NATURE OF CONTRACT	AMOUNT OF CONTRACT	AMOUNT RECEIVABLE

Have any of the above been assigned, sold or pledged?_____ If so, state amount, to whom, and reason_____

4* Sums earned on incomplete contracts, as shown by engineer's or architect's estimate:
(a) Amount receivable after deducting amounts retained $_____
(b) Amounts retained to date, due upon completion of contract $_____

DESIGNATION OF CONTRACT AND FOR WHOM PERFORMED	AMOUNT OF CONTRACT	AMOUNT EARNED	AMOUNT RECEIVED	AMOUNT RETAINED		AMOUNT EXCLUSIVE OF AMOUNT RETAINED
				WHEN DUE	AMOUNT	

Have any of the above been assigned, sold, or pledged?_____ If so, state amount, to whom, and reason_____

*List separately each item amounting to 10 per cent or more of the total and combine the remainder

DETAILS RELATIVE TO ASSETS (Continued)

5* Accounts receivable not from construction contracts $

RECEIVABLE FROM: NAME AND ADDRESS	FOR WHAT	WHEN DUE	AMOUNT

What amount, if any, is past due $

Assigned, sold, or pledged $

6 Deposits with bids or otherwise as guarantees $

DEPOSITED WITH: NAME AND ADDRESS	FOR WHAT	WHEN RECOVERABLE	AMOUNT

What amount, if any, has been assigned, sold, or pledged $

7 Interest accrued on loans, securities, etc. $

ON WHAT ACCRUED	TO BE PAID WHEN	AMOUNT

What amount, if any, has been assigned, sold, or pledged $

7 Interest accrued on loans, securities, etc. $

ON WHAT ACCRUED	TO BE PAID WHEN	AMOUNT

What amount, if any, has been assigned, sold, or pledged $

8 Stocks and Bonds: (a) Listed—book value $

(b) Unlisted—book value $

	DESCRIPTION	ISSUING COMPANY	LAST INT. OR DIV. PAID: DATE	LAST INT. OR DIV. PAID: %	PAR VALUE	Present Market Value	QUANTITY	AMOUNT
1								
2								
3								
4								
5								
6								
7								

	WHO HAS POSSESSION	IF ANY ARE PLEDGED OR IN ESCROW, STATE FOR WHOM AND REASON	AMOUNT PLEDGED OR IN ESCROW
1			
2			
3			
4			
5			
6			
7			

*List separately each item amounting to 10 per cent or more of the total and combine the remainder

DETAILS RELATIVE TO ASSETS (Continued)

9 Materials in stock and not included in Item 4, Assets:

(a) For use on incomplete contracts (inventory value) ____ $ ____

(b) Other materials (inventory value) ____ $ ____

DESCRIPTION OF MATERIAL	QUANTITY	PRESENT VALUE	
		FOR UNCOMPLETED CONTRACTS	OTHER MATERIALS

10 Real estate Book value

(a) Used for business purposes ____ $ ____

(b) Not used for business purposes ____ $ ____

	DESCRIPTION OF PROPERTY	IMPROVEMENTS		TOTAL BOOK VALUE
		NATURE OF IMPROVEMENTS	BOOK VALUE	
1				
2				
3				
4				
5				
6				
7				

	LOCATION	HELD IN WHOSE NAME	ASSESSED VALUE	AMOUNT OF ENCUMBRANCES
1				
2				
3				

	LOCATION	HELD IN WHOSE NAME	ASSESSED VALUE	AMOUNT OF ENCUMBRANCES
1				
2				
3				
4				
5				
6				
7				

11 Construction equipment at book value ____ $ ____

(List separately all items of quarries, gravel pits, warehouses and similar plants which are not included under detail "9"—Real Estate)

QUANTITY	DESCRIPTION, NAME AND CAPACITY OF ITEMS	AGE OF ITEMS	PURCHASE PRICE	DEPRECIATION CHARGED OFF	BOOK VALUE	Encumbrances

Are there any liens against above? ____ If so, state total amount ____ $ ____

*If two or more items are lumped above, give the sum of their ages.

DETAILS RELATIVE TO ASSETS (Continued)

12 Furniture and fixtures at book value ____ $ ____

13 Other assets ____ $ ____

DESCRIPTION	AMOUNT

TOTAL ASSETS $ ____

14 Total value of other contracts awarded or pending award and not included in above statements ____ $ ____

DESCRIPTION OF CONTRACT	FOR WHOM PERFORMED	DATE FOR COMPLETION	AMOUNT

TOTAL (not to be included in assets)

15 List two of largest bonds supplied in each of last three years:

COMPANY	AMOUNT

14 Total value of other contracts awarded or pending award and not included in above statements ____ $ ____

DESCRIPTION OF CONTRACT	FOR WHOM PERFORMED	DATE FOR COMPLETION	AMOUNT

TOTAL (not to be included in assets)

15 List two of largest bonds supplied in each of last three years:

COMPANY	AMOUNT

DETAILS RELATIVE TO LIABILITIES

1 Notes Payable:
- (a) To banks, regular ____ $ ____
- (b) To banks for certified checks ____
- (c) To others exclusive of equipment obligations ____

TO WHOM: NAME AND ADDRESS	WHAT SECURITY	WHEN DUE	AMOUNT

2 Owing Sub-Contractors
- (a) Account of retained percentage ____ $ ____
- (b) Current estimates ____ $ ____

3 **Accounts Payable:** (a) Not past due $_____

(b) Past due $_____

TO WHOM: NAME, ADDRESS	FOR WHAT	DATE PAYABLE	AMOUNT

4 **Encumbrances on equipment (see Item 11, Assets)** $_____

5 **Real Estate encumbrances (see Item 10, Assets)** $_____

6 **Other Liabilities** $_____

DESCRIPTION	AMOUNT

7 **Reserves** $_____

INTEREST	INSURANCE	BLDGS. & FIX.	PLANT DEPR.	TAXES	BAD DEBTS	MAINTENANCE	
$	$	$	$	$	$	$	$

8 **Capital Stock paid up:** (a) Common $_____

(b) Preferred $_____

INTEREST	INSURANCE	BLDGS. & FIX.	PLANT DEPR.	TAXES	BAD DEBTS	MAINTENANCE	
$	$	$	$	$	$	$	$

8	Capital Stock paid up:	(a) Common	$
		(b) Preferred	
9	Surplus		$

TOTAL LIABILITIES . . . $

If a corporation, answer this:

Capital paid in, cash, $

When incorporated

In what State

President's name

Vice-President's name

Secretary's name

Treasurer's name

If a co-partnership, answer this:

Date of organization

State whether partnership is general, limited, or association:

Name and address of partners:	Age

* * * * *

[Forms for affidavit of applicant and of certified public accountant omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1956